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ONTARIO LABOUR RELATIONS BOARD REPORTS



July 1993



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1993] OLRB REP. JULY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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Remedies - Construction Industry - Construction Industry Grievance - Damages - Reconsideration - Board earlier finding violation of collective agreement in employer failure to observe mark-up process but making no damage award where union had not proved that it had members available to do the work - Board analyzing principles underlying "lost opportunity" damages and concluding that proof of loss essential to recovery - Union's reconsideration application dismissed

BECHTEL CANADA INC., EPSCA AND; RE SMW, LOCAL 537..... 581

Remedies - Discharge - Discharge for Union Activity - Interim Relief - Unfair Labour Practice - Board directing reinstatement of discharged employees on interim basis pending final disposition of unfair labour practice complaint - Employer also directed to post Board notice in prominent places in workplace

EAST SIDE MARIO'S, 988421 ONTARIO INC. C.O.B. AS; RE UFCW, LOCAL 175/633..... 587

Remedies - Discharge - Discharge for Union Activity - Interim Relief - Unfair Labour Practice - Union filing complaint in respect of alleged unlawful discharge in August 1992 - Union applying for interim order reinstating discharged employee in February 1993 - In all the circumstances, including the elapsed time between the discharge and the coming into force of section 92.1 and including the applicant's one month delay in filing union's application, Board not satisfied that balance of harm favouring the applicant - Application dismissed

PRICE CLUB CANADA INC.; RE UFCW, LOCAL 175..... 635

Remedies - Construction Industry - Interim Relief - Practice and Procedure - Related Employer - Sale of a Business - Union applying for interim orders directing pre-hearing production of relevant lists and documents - Orders issuing but Board noting that production orders may

be made on written and properly particularized requests, including representations, without recourse to section 92.1 of the Act

HIGHLAND YORK FLOORING COMPANY LIMITED AND HIGHLAND YORK INTERIORS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, CJA ... 607

Right of Access - Interference in Trade Unions - Unfair Labour Practice - Employer directing employees not to engage in union activity or discussion of union related issues on company premises - Board rejecting employer's argument that section 11.1 of the Act altered the law regarding the right of employees to engage in union activity in the workplace - Prohibition of union activity and discussion of union related issues violating section 65 and 67 and declared to be of no effect

SOBEYS INC.; RE UFCW, LOCAL 1000A 675

Sale of a Business - Construction Industry - Interim Relief - Practice and Procedure - Related Employer - Remedies - Union applying for interim orders directing pre-hearing production of relevant lists and documents - Orders issuing but Board noting that production orders may be made on written and properly particularized requests, including representations, without recourse to section 92.1 of the Act

HIGHLAND YORK FLOORING COMPANY LIMITED AND HIGHLAND YORK INTERIORS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, CJA ... 607

Settlement - Health and Safety - Practice and Procedure - Employer asking Board not to inquire into complaint on the basis that the matter had been settled - Board finding no good reason to permit the applicant to resile from his agreement and some good reasons not to permit him to do so - Board not inquiring further into complaint

STEEP ROCK RESOURCES INC.; RE CHRIS WALKER; RE TEAMSTERS LOCAL UNION 91 680

Termination - Practice and Procedure - Timeliness - Board exercising its discretion under section 105(2)(i) to refuse to entertain second termination application made by applicant within period of a few weeks - Application dismissed - Applicant also barred from filing new termination applications for a period of six months

VENTURE INDUSTRIES CANADA LTD. (THE "COMPANY" OR "THE EMPLOYER"); RE RANDY A. BURKE; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 127 ("THE UNION") 707

Timeliness - Termination - Practice and Procedure - Board exercising its discretion under section 105(2)(i) to refuse to entertain second termination application made by applicant within period of a few weeks - Application dismissed - Applicant also barred from filing new termination applications for a period of six months

VENTURE INDUSTRIES CANADA LTD. (THE "COMPANY" OR "THE EMPLOYER"); RE RANDY A. BURKE; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 127 ("THE UNION") 707

Unfair Labour Practice - Adjournment - Evidence - Practice and Procedure - Board declining to adjourn unfair labour practice complaint pending resolution of employment status issue - Board declining to dismiss application for want of particulars - Board declining to dismiss application for failure to raise *prima facie* case - Board directing responding party to proceed first with its evidence

THE ESSEX COUNTY BOARD OF EDUCATION; RE OSSTF 687

Unfair Labour Practice - Collective Agreement - Duty to Bargain in Good Faith - Interference

with Trade Unions - Final Offer Vote - Employer final offer containing duration clause of June 30, 1993 to July 1, 1993 - Final offer vote under section 40 the *Act* taking place in December 1992 resulting in acceptance by employees - Union refusing to execute offer - Union asking Board to direct extension of duration clause contained in final offer to one year from date of final offer vote and to require execution of collective agreement bearing that term - Union's application dismissed

PEACOCK LUMBER LTD.; RE RWDSU, AFL-CIO-CLC 633

Unfair Labour Practice - Construction Industry - Change in Working Conditions - Duty to Bargain in Good Faith - Remedies - Employer violating "statutory freeze" in failing to contact union office when it needed new employees and in failing to pay wages and benefits required by collective agreement - Employer directed to compensate union on behalf of its members - Employer operating entirely outside terms of agreement during period of bargaining - Employer failing to make every reasonable effort to make a collective agreement - In circumstances of this case, however, Board preferring to allow bargaining process to continue rather than to impose settlement on the parties under section 91(4)(d) of the *Act* - Parties directed to meet and bargain in good faith

GENERAL WOOD PRODUCTS; RE CJA, LOCAL 1072 597

Unfair Labour Practice - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Board directing reinstatement of discharged employees on interim basis pending final disposition of unfair labour practice complaint - Employer also directed to post Board notice in prominent places in workplace

EAST SIDE MARIO'S, 988421 ONTARIO INC. C.O.B. AS; RE UFCW, LOCAL 175/633 587

Unfair Labour Practice - Construction Industry - Duty of Fair Referral - Union imposing fine on complainant following trial and conviction - Union refusing to issue referral slip to complainant in response to requested name hire - Union's conduct in a number of respects found to be arbitrary, discriminatory and in bad faith - Board directing that complainant be compensated for losses flowing from violation of the *Act* and remaining seized

MICHAEL A. RANKIN; RE LOCAL 721 OF THE BRIDGE, STRUCUTAL AND ORNAMENTAL IRONWORKERS OF AMERICA 644

Unfair Labour Practice - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Union filing complaint in respect of alleged unlawful discharge in August 1992 - Union applying for interim order reinstating discharged employee in February 1993 - In all the circumstances, including the elapsed time between the discharge and the coming into force of section 92.1 and including the applicant's one month delay in filing union's application, Board not satisfied that balance of harm favouring the applicant - Application dismissed

PRICE CLUB CANADA INC.; RE UFCW, LOCAL 175 635

Unfair Labour Practice - Interference in Trade Unions - Right of Access - Employer directing employees not to engage in union activity or discussion of union related issues on company premises - Board rejecting employer's argument that section 11.1 of the *Act* altered the law regarding the right of employees to engage in union activity in the workplace - Prohibition of union activity and discussion of union related issues violating section 65 and 67 and declared to be of no effect

SOBEYS INC.; RE UFCW, LOCAL 1000A 675

Unfair Labour Practice - Discharge - Intimidation and Coercion - Judicial Review - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communi-

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cations about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer's application for judicial review dismissed by Divisional Court

SOBEYS INC. RE; U.F.C.W., LOCAL 1000A.....

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2306-91-G Sheet Metal Workers International Association, Local 537, Applicant v. Electrical Power Systems Construction Association and Bechtel Canada Inc., Responding Parties

Construction Industry - Construction Industry Grievance - Damages - Reconsideration - Remedies - Board earlier finding violation of collective agreement in employer failure to observe mark-up process but making no damage award where union had not proved that it had members available to do the work - Board analyzing principles underlying "lost opportunity" damages and concluding that proof of loss essential to recovery - Union's reconsideration application dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER W. N. FRASER; July 28, 1993

1. The applicant, through counsel, has requested reconsideration of the Board's decision in this matter dated May 28, 1993. In that decision, the Board found Bechtel Canada Inc. ("Bechtel") in violation of the collective agreement. The Board, however, declined to award damages because there was no evidence before it that the applicant union or its members had suffered a monetary loss as a result of the failure to hold a mark up meeting. Having made this determination, the Board found it unnecessary to deal with other arguments put forward by Bechtel against an award of damages, including an argument that the terms of the collective agreement preclude a claim for damages arising out of a work assignment dispute.

2. Section 108(1) of the *Labour Relations Act* provides that:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

3. In *Ontario Hydro; Electrical Power Systems construction Association; Labourers' International Union of North America, Local 1059*, May 12, 1993 (unreported) the Board discussed its approach to reconsideration:

Under section 108(1), the Board has a broad discretion to reconsider any decision. That discretion must be exercised judicially. Both section 108(1) and legal and labour relations considerations require the Board to operate from the premise that a Board decision is final and conclusive for all purposes, unless there is a good reason to change it. Consequently, the Board will not usually reconsider a decision unless an obvious error is identified; or a request for reconsideration raises important policy issues which have not received adequate attention or consideration; or the party requesting reconsideration proposes to present new evidence which it could not, with the exercise of due diligence, have obtained and presented previously, and which new evidence would, if accepted, have a material impact on the decision in question; or that a party seeks to make representations which it has had no previous opportunity to make.

In many ways, the Board's approach to reconsideration mirrors the manner in which the Board applies the doctrine of *res judicata* (or a principle like it). *Res judicata* is a form of estoppel which, in its modern form, is based on two broad public policy principles:

- (a) that all litigation should have an end; and
- (b) no party should be forced to litigate the same matter more than once.

The doctrine of *res judicata* operates to preclude a party or its privies from re-litigating issues (other than through an available appellate process) which have been resolved by a final decision on the merits by a court or tribunal with the jurisdiction to decide the matter. In essence, a specific final determination of the right, question, or fact, is conclusive evidence thereof in any subsequent proceeding between the same parties or their privies (or, if the decision is in rem, in any subsequent proceeding) so long as the decision stands, unless the party otherwise bound by the decision alleges the fact which would, if proved, have a material effect on the decision and the evidence required to establish that fact could not, by the exercise of reasonable diligence, have been previously discovered (See *Angle v. Minister of National Revenue*, [1975] SCR 248; *Town of Grandview v. Doering*, (1975) 61 DLR (3d) 455 (Supreme Court of Canada)).

In the case before us, there is no suggestion that the applicant wishes to adduce new evidence which it could not previously have obtained nor that the applicant wishes to make representations that it had no opportunity to raise previously. Further, we are not persuaded that the request raises any significant and important issues of Board policy. In any event, there is nothing in this request for reconsideration which casts doubt on the merits of the prior decision.

4. The portions of the Board's May 28 decision which are objected to by the applicant are as follows:

20. In the case before us, the applicant asserts that the loss suffered as a result of this violation was the loss of an opportunity. No other theory of damages was advanced. In essence, the applicant asserts that it was denied the chance to make a meaningful claim to the work in dispute in a properly established mark-up process. Had it been accorded the chance to make a meaningful claim, it would have received the opportunity to have its members perform the work. As a result of the violation of the agreement, it was denied this opportunity. In the submission of the applicant, the measure of its lost opportunity is the wages and benefits for the number of hours required to complete the work. The applicant called evidence as to the number of hours it asserts would be required, as did the responding parties. However, the applicant asserts that it need not prove *actual* loss to its members by proving that it had tradesmen as of September 1991 who were available to do the work. Relying on *Ontario Hydro*, [1988] OLRB Rep. Dec. 1303, counsel states that it is not necessary for the applicant to prove actual damages in a loss of opportunity case resulting from the failure to hold a proper mark-up meeting.

21. Counsel, in our view, is merging two related concepts. Assuming that the appropriate theory of damages in this case is lost opportunity, the applicant has to establish, on a balance of probabilities, that it would have received an opportunity but for the violation *and* that its members suffered a loss by not having received the opportunity. We agree that it is not necessary for an applicant, in order to be entitled to damages, to establish with 100% certainty that its members would have been assigned the work in question but for the violation of the agreement. However, assuming that the applicant can establish that it would have received the work assignment (or opportunity) but for the violation, it still has to establish that it or its members suffered a loss by not receiving the opportunity. Where there is no evidence that the applicant had members who could have availed themselves of the offer of work, there is no evidence that the applicant or its members have suffered a loss by not receiving the opportunity.

22. On the theory of damages advanced by the applicant, we cannot see a distinction between this case, and *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America*, Local 2486 (1975), 57 D.L.R. (3d) 199. In *Re Blouin Drywall*, the Ontario Court of Appeal upheld an award of damages arising out of an employer's use of non-union employees, stating:

"Having found that the employer was in breach of the agreement, the amount of wages lost, and that there were union members available to do the work, the Board had jurisdiction to make the order in question."

23. *Re Blouin Drywall*, did not involve the failure to observe mark-up requirements in a collective agreement but the loss asserted, i.e. wages and benefits to union members, is the same as that asserted before us. The burden of evidence arising out of *Re Blouin Drywall* is not a diffi-

cult one for a union to meet. In fact, prior to *Re Blouin Drywall*, the law required a union to *name* each member that suffered the loss asserted. We note that in *Ontario Hydro, supra* (and in the subsequent unreported decision of April 17, 1989), which was a “mark-up” case, where the Board did not specifically refer to having received evidence of unemployed tradesman, the issue does not appear to have been raised.

24. We therefore conclude that although there is a violation of the collective agreement, and we so declare, we have no evidence of loss on which we can base an award of damages.

25. Because of our findings, we do not need to deal with other arguments advanced by Bechtel, including the assertion that Article 8.6 of the agreement precludes an award of damages in any event.

5. In the request for reconsideration, counsel for the applicant states, among other things:

Legal Submissions

- (g) The Board committed a jurisdictional error in declining jurisdiction to provide a remedy in general damages where it endorsed and sustained the theory of liability on the basis of lost opportunity.

- (h) As stated in paragraph 20,

“...the Applicant asserts that it need not prove *actual* loss to its members by providing that it had tradesmen as of September, 1991 who were available to do the work. Relying on *Ontario Hydro*, [1988] O.L.R.B. Rep. Dec. 1303, counsel states that it is not necessary for the Applicant to prove actual damages in a loss of opportunity case resulting from the failure to hold a proper mark-up meeting.”

- (i) The Board required proof of the availability of members of Sheet Metal Workers, Local 537 ready, willing and able to perform the work. It is submitted that the Board ignored both the theory of recovery sustained by it in its decision as well as the evidence of Mr. Norman Agnew above-stated. Clearly, Mr. Agnew’s statement that he claimed the work on behalf of his unemployed members is sufficient to establish such fact where unchallenged on cross-examination.

- (j) However, more fundamental is the Board’s jurisdictional error in requiring such evidence at all. The Board noted, at paragraph 23, that,

“...in *Ontario Hydro, supra*, (and in the subsequent unreported decision of April 17, 1989), which was a ‘mark-up’ case, (where) the Board did not specifically refer to having received evidence of unemployed tradesmen...”

It is not simply a matter that this issue did not seem to have been raised in that case. By virtue of the “lost opportunity” thesis for recovery, such proof is not necessary and irrelevant to the issue to be determined by the Board. The Board must determine the percentage chances of success for the Applicant to obtain the work assignment had a proper mark-up meeting been held. This Board declined to do so.

6. Counsel relies on *Radio Shack*, [1979] O.L.R.B. Rep. Dec. 1220 [upheld on judicial review as *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America and Ontario Labour Relations Board*, (1981) 115 D.L.R. 197 (Ont. Div. Ct.)]. In counsel’s submission, the Board in *Radio Shack* “specifically endorsed the theory of ‘lost opportunity’ as a basis for recovery of general damages and specifically acknowledged that there *could not* be proof of an actual amount as it is a contingent liability based on hours of work.” Counsel relies, among others, on the following passages from *Radio Shack*:

What trade unions like the complainant and the employees it represents lose in cases of this kind

is 'the loss of an opportunity' to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time. Employees join a trade union with, in their minds at least, the reasonable prospect of obtaining an improvement in their working conditions. In fact, the complainant may be able to statistically document the reasonableness of such employee expectations. When an employer responds with flagrant unfair labour practices, he wrongly prevents his employees from realizing their expectations or delays having to deal with any of their demands... Moreover, the employer receives an unfair competitive advantage over those employers who do bargain in good faith, making the unlawful conduct attractive to other employers. In labour relations terms, these employee losses are real; the potential employer gains unjustly; and both are accomplished by the violation of a fundamental duty imposed by the legislation -- bargaining agent recognition. Failure to consider any monetary relief seems to encourage these consequences.

"It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature -- a result which would appear to contravene the first tenant discussed. The argument, however, is inconsistent with the long-accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See: *Mayne and McGregor* on damages, 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages... Even more directly on point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

A general damage award to all of the employees in the bargaining unit of the kind we have in mind, would not amount to the dictation of contract terms. Rather, it acknowledges that the wrong the Board is addressing is not the denial of a right to a particular collective agreement, but rather the right to bargain collectively in pursuit of such a contract. Thus, it is the prospects of the employees of increased earnings from the exercise of the trade unions' bargaining capacity in negotiations which have been impaired by the employer's wrongful acts and refusal to engage in collective bargaining. It is therefore this 'loss' -- the bargaining expectancy -- that must be assessed."

7. Counsel for the applicant also relies on the following: *Consolidated Bathurst Packaging Ltd.*, [1984] O.L.R.B. Rep. Mar. 422; *Angelo Ritrovato* [1986] O.L.R.B. Rep. Oct. 1401; *Re Burrard Yarrows Corporation, Vancouver Division and International Brotherhood of Painters, Local 138* (1981) 30 L.A.C. (2d) 331; *Chaplin v. Hicks*, [1911] 2 K.B. 786; *Re Eldorado Nuclear Ltd. and Public Service Alliance of Canada, Eldorado Group* (1973), 5 L.A.C. (2d) 94; *Re Dominion Stores Ltd. and Retail, Wholesale & Department Store Union* (1982) 4 L.A.C. (3d) 127; and *Mayne and McGregor*, 12th ed., 1961, para. 174.

Failure to Consider Relevant Evidence

8. Counsel asserts that Norm Agnew, a Business Agent for the applicant, established in his evidence that he claimed the work in dispute on behalf of available unemployed members of Sheet Metal Workers, Local 537. Thus, it is submitted, although no out-of-work list applicable to this period of time was tendered in evidence, Mr. Agnew's evidence was sufficient to establish that members of Local 537 were ready, willing and able to perform the work in dispute.

9. Mr. Agnew testified "I claimed it was metal insulated panels, the work had been marked up, it was my work". Later he stated "we sat down, discussed a few items of how we could resolve it...I claimed it, and would not turn it over to the Carpenters" Mr. Agnew also testified that he did not supply any sheet metal workers to perform the work in dispute. In cross-examination, it was put to Mr. Agnew that the dispute which was the subject of a meeting called on September 23, 1991 was that "someone else was doing the work you should have", to which Mr. Agnew replied "that's why I called Lyons".

10. There are no other references in Mr. Agnew's evidence that come close to dealing with

the specific claim made to the work in dispute. Taken as a whole, the Board cannot reasonably draw from his evidence the inference that the applicant had members who were ready, willing and able to perform the work in dispute. The Board is particularly reluctant to draw the inference where such evidence is clearly within the knowledge of the applicant, and could have been easily introduced through Mr. Agnew.

Theory of “Lost Opportunity”

11. It was submitted that the Board endorsed the theory of recovery on the basis of lost opportunity and then ignored it when it required the applicant to establish that it had unemployed members who were ready, willing and able to perform the work.

12. It is true that the Board accepted for the purposes of this case the theory of lost opportunity as a basis for recovery of damages. This was the theory proposed by the applicant and, although Bechtel disputed the appropriateness of damages in this case on several grounds, it did not take issue with this general theory. As the cases relied upon by the applicant demonstrate, the theory of lost opportunity has been applied where an aggrieved party cannot prove loss of a definite benefit but only the loss of an *opportunity* of receiving a benefit. The courts, and the Board in *Radio Shack* and other cases, have rejected the argument that the uncertainty of such a loss should prevent the award of damages.

13. In “lost opportunity” cases, the loss is uncertain precisely because it is difficult to recreate the precise result which would have unfolded had it not been for a breach. It is difficult to assess, in the context of various contingencies, the value of the “lost opportunity”. In many cases, the courts have taken account of the contingent nature of the loss by apportioning damages based on an assessment of the value of the lost opportunity. In *Radio Shack*, the Board quoted from *Hall v. Meyrick*, [1957] 2 Q.B. 455 in which Ashworth, J. stated “The more the contingencies the lower the value of the chance or opportunity of which the plaintiff was deprived.” This was also the approach followed by the Board in *Ontario Hydro*, [1988] O.L.R.B. Rep. Dec. 1303.

14. The applicant asserts in this request for reconsideration that since this theory of recovery is predicated upon an “available opportunity” and not on the actual losses sustained if the available opportunity had materialized, no further evidence of the “availability” of the opportunity is necessary. It is thus unnecessary to have evidence that Local 537 had members ready, willing and able to perform the work.

15. The Board does not accept this submission. Although “lost opportunity” is a notion that has been applied by the courts and by this Board to provide for the recovery of damages even where the outcome was uncertain, its application is still subject to the same general principles as in any assessment of damages. The aggrieved party has the general burden of proving that it has suffered the loss for which compensation is claimed. Without a loss, there is no basis for compensation.

16. In *Radio Shack*, the Board awarded damages to bargaining unit employees for “all monetary losses that the Complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate heretofore a collective agreement due to the Respondent’s earlier unlawful conduct...” The Board ordered a hearing to be scheduled for determination of the damages. There was no suggestion by the Board that the union was relieved of any obligation to prove on a balance of probabilities the losses that were caused by the company’s unlawful conduct. In *Re Dominion Stores Ltd. and Retail, Wholesale & Department Store Union*, supra, the arbitration board stated that “[i]f [the lost opportunity] approach is adopted it then becomes necessary to value this ‘lost opportunity’ by estimating both the *total wages lost* and the probability that the

union would have succeeded in persuading the employer to follow an alternative course of action..." [emphasis added].

17. In "lost opportunity cases" therefore, tribunals are prepared to award damages even where there is no certainty that the benefit would have been realized but for the breach of an agreement or (as in *Radio Shack*) unlawful conduct. However, there is still a requirement that the loss be proved. These cases recognize that the loss of the opportunity alone is not the basis for an award of damages; rather, it is the loss of an opportunity which would have, but for the breach, led to some benefit. In *Kinkel et al. v. Hyman et al.*, [1939] 4 D.L.R. 1, quoted in *Radio Shack*, the Supreme Court of Canada stated:

"For my part I can find no authority in either *Chaplin v. Hicks* or *Carson v. Willitts* justifying any Court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value."

18. In this case, the applicant asserts that the value of its lost opportunity is close to 100% of the wages and benefits for the number of hours required to complete the work, on the theory that its chances of success at a properly constituted mark-up meeting would have been something close to 100%. On the applicant's theory, it is entitled to recover these damages even in the absence of any evidence that its members would have been available to perform the work. On the same theory, it would be entitled to recover these damages even if its membership had been at full employment and the applicant could not have supplied any sheet metal workers to Bechtel. Clearly, such a result is contrary to the principles of compensation.

19. The result urged by the applicant would turn the theory of "lost opportunity" which courts and tribunals have applied to permit the recovery of damages for loss of a chance of a benefit, into a theory which would allow recovery without any proof of loss. It may be that nominal damages are appropriate where there is no proof of loss; however, this was not argued in the case before us.

20. Since *Re Blouin Drywall Contractors Ltd. and the United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 57 D.L.R. (3d) 199, there has been no doubt that a union can recover damages on behalf of its members who are neither employees at the time of the grievance, nor parties to the grievance. However, in order to establish entitlement to damages, the Board has required evidence of monetary loss, for which purpose it has accepted the evidence of union representatives with respect to the union's out-of-work members. *Blouin Drywall* concerned the failure of the company to hire members of the union. Other cases before the Board have applied the same principles to the failure to abide by subcontracting provisions of collective agreements. The purpose of the award of damages is the same in all these cases, and in the one before us: to place the aggrieved party in the position it would have been in had the contract been carried out (see *Blouin Drywall*, p. 210).

21. The application of the "lost opportunity" theory should not place the applicant before us in a better position than a union claiming damages for breach of a union security or subcontracting provision. We see no reason in law to accept the arguments of the applicant which would relieve it of its obligation to establish, through evidence, its loss.

22. As we stated in our previous decision, in *Ontario Hydro, supra*, the Board did not refer to having received evidence of unemployed tradesmen. We do not take the absence of such a reference in that case to support the position of the applicant before us.

23. This application for reconsideration is dismissed.

DECISION OF BOARD MEMBER J. REDSHAW; July 28, 1993

1. I dissent.
 2. I stand by my original dissent and I also accept the argument of counsel for the applicant re: "loss of opportunity".
 3. In my opinion, the Board should reconsider its original decision.
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1119-93-M United Food and Commercial Workers Union, Local 175/633, Applicant v. 988421 Ontario Inc. c.o.b. as **East Side Mario's**, Responding Party.

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Board directing reinstatement of discharged employees on interim basis pending final disposition of unfair labour practice complaint - Employer also directed to post Board notice in prominent places in workplace

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Kobryn*.

DECISION OF THE BOARD; July 5, 1993

1. The Board hereby directs that 988421 Ontario Inc. c.o.b. as East Side Mario's forthwith reinstate Eric Desbiens and Albert Francoeur, on an interim basis, pending the final disposition of their unfair labour practice discharge complaint Board File 1120-93-U. We do not think that it is appropriate and we decline to grant any order regarding compensation to the grievors.
 2. The Board further directs 988421 Ontario Inc. c.o.b. as East Side Mario's to post the notice attached as Appendix "A" in prominent places in the workplace, where it is most likely to be seen by employees interested in these proceedings.
 3. Reasons for this decision and direction will follow in a subsequent decision.
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Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH A DIRECTION OF THE BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO MAKE SUBMISSIONS.

THE BOARD HAS ORDERED 988421 ONTARIO INC. C.O.B. AS EAST SIDE MARIO'S TO REINSTATE ERIC DESBIENS AND ALBERT FRANCOEUR ON AN INTERIM BASIS UNTIL THE BOARD CONSIDERS THE REASON FOR THEIR DISCHARGE. A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON JULY 15, 1993. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY ERIC DESBIENS AND ALBERT FRANCOEUR WERE DISCHARGED.

IF THE BOARD ULTIMATELY DETERMINES THAT ERIC DESBIENS AND ALBERT FRANCOEUR WERE DISCHARGED FOR MISCONDUCT AND THEIR SUPPORT FOR THE UNION HAD NOTHING TO DO WITH IT, THE TEMPORARY REINSTATEMENT ORDER WILL BE REVOKED, AND THE COMPANY WILL NO LONGER BE REQUIRED TO EMPLOY THEM.

IF THE BOARD ULTIMATELY FINDS THAT THEIR DISCHARGE OCCURRED BECAUSE THEY WERE UNION SUPPORTERS, EXERCISING THEIR RIGHTS UNDER THE LABOUR RELATIONS ACT, THE BOARD MAY CONFIRM THEIR REINSTATEMENT, AND DIRECT THAT THEY BE COMPENSATED FOR ALL EARNINGS AND BENEFITS LOST AS A RESULT OF THEIR DISCHARGE.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT TO OPPOSE A TRADE UNION, OR SUBJECT TO THE UNION SECURITY CLAUSE IN THE COLLECTIVE AGREEMENT WITH HIS OR HER EMPLOYER, REFUSE TO JOIN A TRADE UNION.

AN EMPLOYEE HAS THE RIGHT TO CAST A SECRET BALLOT IN FAVOUR OF, OR IN OPPOSITION TO, A TRADE UNION IF THE ONTARIO LABOUR RELATIONS BOARD DIRECTS A REPRESENTATION VOTE.

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED BY AN EMPLOYER OR BY A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING THE UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IT IS UNLAWFUL FOR EMPLOYEES TO BE FIRED OR IN ANY WAY PENALIZED FOR THE EXERCISE OF THESE RIGHTS. IF THIS HAPPENS, A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

IT IS UNLAWFUL FOR ANYONE TO USE INTIMIDATION TO COMPEL SOMEONE ELSE TO BECOME OR REFRAIN FROM BECOMING A MEMBER OF A TRADE UNION, OR TO COMPEL SOMEONE TO REFRAIN FROM EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

988421 ONTARIO INC. C.O.B.
AS EAST SIDE MARIO'S

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 5th day of July, 1993.

2029-91-G Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Ellis-Don Limited**, Responding Party.

Construction Industry - Construction Industry Grievance - Union alleging breach of sub-contracting provision of collective agreement - "Cleanup" work in question found to be work in the construction industry and covered by provincial collective agreement - Grievance allowed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *F. B. Reaume* and *J. Redshaw*.

APPEARANCES: *S. B. D. Wahl* and *William Suppa* for the applicant; and *Walter Thornton* and *P. Richer* for the responding party.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER J. REDSHAW; July 29, 1993

1. This is a referral of grievance to arbitration pursuant to the provisions of section 126 of the *Labour Relations Act*, in which the applicant (referred to hereafter as "the Labourers" or "the union") alleges that Ellis-Don Limited ("Ellis Don" or "the company") has violated the provisions of the provincial collective agreement to which the parties are bound. The Labourers contend that Ellis Don has subcontracted work covered by this agreement to a company which is not in contractual relations with the union. The Labourers seek damages on its own behalf and on behalf of its members for the failure to subcontract the work in accordance with the collective agreement. Ellis Don takes the position that the work in question is not work in the construction industry and therefore, is not covered by the collective agreement. In the alternative, the company asserts that the union is not entitled to the relief requested as there were no appropriate union subcontractors available to perform the work.

2. The parties agreed and the Board ruled at the hearing that the Board would determine the issue of liability and, if the grievance is upheld, remain seized of the issue of remedy, including the issues raised by Ellis Don with respect to the availability of union subcontractors.

I

3. The Board heard the evidence of Roderick Goodall and Douglas Page, and received documentary material in the form of contract documents, time sheets and other material, which we have reviewed in detail. Ultimately, there is little in the evidence which is in dispute, and the case is centred on the opposing views which the parties take of the facts and the legal conclusions that should be drawn from them.

4. The grievance involves the construction of an Ontario government office building in Sault Ste Marie to house the Ontario Lottery Corporation as well as some offices of the Ministry of Natural Resources. The building is commonly referred to as the "Lotto Centre". Ellis Don entered into a general contract with the government to construct the building. Part of the work which Ellis Don contracted to perform was the cleanup of the premises at the completion of construction. This cleanup work was sub-contracted by Ellis Don to a company called Final Touch Maintenance Services ("Final Touch"), which was on the construction site from August, 1991 to April, 1992.

5. The General Conditions which form part of the contract documents state that "at the completion of the Work, [Ellis Don] shall remove all debris, tools, equipment and surplus materials from the Site and shall leave the work clean and suitable for occupancy unless more exactly

specified.” In the section of the contract documents describing Final Clean Up, the instructions state:

1. **CLEANING**

- 1.1 Close rooms and areas finished by painters and decorators to all but authorized persons.
- 1.2 Keep access areas to work reasonably clean during work and on completion. On completion of work remove stains, dust, smudges caused by work within work areas of this Contract. Within this work area wash and polish interior glass and clean and apply coat of wax to finished resilient floors. Make good any damage caused outside work area including doing necessary cleaning required due to work.
- 1.3 Replace broken, damaged or scratched glass and mirrors, which are part of work.
- 1.4 Use appropriate apparatus and cleaning materials. Clean work in strict accordance with applicable Sections and/or manufacturer's directions.
- 1.5 Upon completion of final cleaning, remove cleaning equipment, materials and debris from building site.

6. Not all of the work described above was performed by Final Touch; however, the work of Final Touch is included in the description above.

7. Although the parties spoke of Final Touch having been sub-contracted the work by Ellis Don, there does not appear to be a contract in writing between Ellis Don and Final Touch. Instead, the relationship between Final Touch and Ellis Don is described in a general written proposal by Final Touch setting out the work it can perform, estimates by Final Touch for the work on specific floors of the project and then subsequent purchase orders issued by Ellis Don. Some of the work was not specifically estimated prior to commencement, but simply performed and then invoiced by Final Touch.

8. In a letter dated March 5, 1991, Rod Goodall, the owner of Final Touch set out a description of the services which his company was prepared to offer to Ellis Don on the Lotto Centre project:

DESCRIPTION OF SERVICES

--For Supply of all labour, materials and [sic] tools for the following:

- A. WINDOWS:
 - 1. Stickers, tape, plaster removed
 - 2. Glass cleaned and polished, interior & exterior
 - 3. Window frames etc. vacuumed and washed.
- B. FLOORS:
 - 1. Sweep, dust mop
 - 2. Edges, baseboards vacuumed.
 - 3. Wash and rinse
 - 4. When applicable - stripping/sealing & waxing
- C. DARPETS:[sic]
 - 1. Vacuumed

2. Minor sport [sic] removal

D. WASHROOMS: 1. All sinks, toilets, counters, mirrors, floors, walls cleaned, washed, sanitized and polished.

E. GENERAL:

1. Baseboards vacuumed &/or washed.
2. Walls spot cleaned as needed
3. Door frames, handles, kick plates cleaned and polished
4. Fire extinguishers, hose cabinets cleaned.
5. Removal of dirt and construction debris from site to dumpster.
6. Dusting &/or washing of all other items soiled by construction, i.e. Desks/shelves, counters, kitchened [sic] items etc.
7. Report of any damages or deficiencies to site supervisor.
8. Assist in the up-keep of main trade areas - Dust control, Safety & appearance.

9. Most of the work described in the above document was ultimately performed by Final Touch at the Lotto Centre. Some was performed by others. For instance, the cleaning of windows was done by another company, under sub-contract from the company that installed them. As well, Goodall testified that his employees did not remove dirt and construction debris to the dumpster. For the most part, construction debris had already been cleared away from the site by construction labourers employed by Ellis Don. Final Touch employees occasionally had to deal with small bits of mortar, drywall, and other rubbish created by the construction process. Where Final Touch employees were involved in cleaning up rubbish, they placed it in garbage bags which were removed to the dumpster by the construction labourers. Some of this rubbish was created by the cleaning process, for example, chrome protective wrapping and plastic carpet covering which was peeled away by Final Touch employees.

10. Goodall testified that as a rule, his employees are "the last trade on site". On this project, the building was turned over to its occupants gradually, with several floors at a time made ready for occupancy. The work done by Final Touch was completed before the turnover of the premises, except where deficiencies required it to do additional work after turnover. The overall time period over which the building was gradually occupied was more than two months in duration. Although it was intended that the work done by Final Touch be the final cleanup when all other work was completed, in fact, there were times when Final Touch employees had to re-clean certain areas because of further traffic in those areas. For instance, use of cleaned areas by architects, inspectors, telephone and computer installation people, government personnel and tradespersons working on deficiencies, resulted in further cleaning by Final Touch. Some of this further cleaning was performed when areas were already occupied, and some of it was done in as-yet unoccupied areas.

11. Ellis-Don supervisors notified Final Touch as to the scheduling of cleaning work in specific areas. Ellis Don had target dates for the turnover of floors, and Final Touch was expected to have its cleaning done before those dates. Once Final Touch finished its primary cleaning, it was inspected by Ellis Don's site supervisors. Proctor and Redfern, the consulting engineers, also inspected the work on behalf of the owner, the government.

12. Goodall testified that labourers employed by Ellis Don performed some of the initial

cleaning of the site, such as sweeping, vacuuming (using the shop-vac), and removal of equipment and debris after the other trades were finished. He stated that the labourers "take the clean-up to a degree" whereas his employees gave the site the "final touches". An example given of the division of cleanup work between the construction labourers and the employees of Final Touch was in relation to power boxes. Labourers raised portions of the concrete flooring and vacuumed and cleaned the wiring and other components underneath the floor. After the flooring and carpeting was re-assembled, Final Touch employees cleaned each UPS power box attached to the floors with specialty vacuums, brushes and anti-static treated cloths.

13. In performing the cleanup work, Final Touch used some general cleaning equipment, plus some more specialized machinery, such as a van-mounted carpet steam cleaner. Goodall testified that one characteristic which distinguished the type of work performed by his employees from the work performed by the construction labourers was the use of specialized cleaning solutions, which requires a certain level of knowledge in the field. He states that perhaps 30-35 different types of cleaning solutions were used on this site. It appears, however, that the employees of Final Touch did not receive special training with respect to these, except for on-the-job instruction from their forepersons.

14. Construction on the project started in 1989. Final Touch began its cleaning work in August of 1991. The certificate of substantial performance for the purposes of the Construction Lien Act was issued on February 19, 1992. The agreement between Ellis Don and the government states that the project is deemed substantially performed when it is "ready for use or is being used for the purpose intended" and capable of completion or correction at a specified maximum cost. The certificate of total performance was issued on December 22, 1992. Final Touch was on the project until near the end of April, 1992, although the hours worked in March and April were far fewer than in previous months. It appears that the months of greatest activity by Final Touch were November 1991 to January 1992. The hours worked by Final Touch employees over a period of about 8 months from August 1991 to April 1992 totalled more than two thousand hours.

15. Most of the work of Final Touch is in building maintenance, not related to construction activities. For its maintenance work, the company has a group of regular employees who work regular shifts. Some of these employees worked on the Lotto Centre project, and were supplemented by short-term employees hired for the duration of this project. Final Touch bid on the maintenance work for the Lotto Centre, but did not get the contract.

16. Most of the work done by Final Touch on this project was done at night, essentially because it was more convenient to co-ordinate the cleaning work around the other work. Some of the work, for instance, required sealing or waxing floors and thus was more conveniently done when no other people were using the premises.

17. Goodall from time to time went to the site to check on the work. On some occasions, he participated in tours of the project along with other sub-contractors, for purposes of inspection or co-ordination of the work of the sub-trades.

18. Douglas Page is a construction labourer who worked for Ellis Don on the Lotto Centre project from September 1989 to December 1991. He testified that it was his job to clean the construction site offices and lunchroom. He used brooms, dust pans, mops, cleaning solutions, rags, and vacuum cleaners. The premises which he cleaned were temporary premises, used during construction and in a relatively unfinished state.

II

19. The provincial collective agreement requires employers bound to it to employ only members of the union to perform work covered by the agreement. Schedule “E” of that agreement, which sets out a list of work which is claimed by the union, includes the following paragraph:

Cleaning and clearing of all debris including wire brushing of windows, scraping of floors, removal of surplus material and cleaning of all debris in building and construction areas. The cleanup of all work areas.

20. It is the primary position of the Labourers that the work performed by Final Touch is construction industry work and is covered by the Labourers provincial collective agreement. In the alternative, the Labourers assert that even if the work is *not* construction industry work, it is covered by the collective agreement by virtue of Article 2.05, which states:

2.05 The Employer agrees to engage only subcontractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract except as provided in Schedule “D” hereof.

21. It is the position of the Labourers under this alternative argument that work outside of the construction industry, as long as it is part of an “I.C.I. General Contract”, is subject to Article 2.05. With respect to the primary position, it was submitted that among the responsibilities of Ellis Don under its general contract to construct the Lotto Centre was the cleaning and maintenance of temporary facilities, and the final cleanup in anticipation of occupation. There is no material distinction between these two types of cleaning. Both are necessitated by and necessary to the completion of the construction work performed in connection with this project. Both are responsibilities that Ellis Don took on as part of this project.

22. Counsel urged the Board to look to the certificate of total completion, or at the least, the certificate of substantial performance, as a signpost as to when construction work ends on a project. On either measure, the work done by Final Touch is work on the construction side of the line.

23. The similarity of the work performed by Final Touch on a construction site and that performed as part of a maintenance contract should not be persuasive, since this can be true with respect to other types of contractors, who use the same tools for work on a maintenance project as on a construction project. There is nothing unique about the work functions performed by Final Touch employees. Some special skills or knowledge is required by the working forepersons on the job, but not by the casual labourers employed by Final Touch.

24. The Board was referred to the following cases: *Ming Sun Holdings Inc.*, [1987] OLRB Rep. Dec. 1585; *Nu-West Development Corporation Ltd.*, [1983] OLRB Rep. May 692; *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789 and *Honeywell Limited*, [1993] OLRB Rep. Feb. 128.

25. Counsel for the company submits that the most relevant evidence from which the Board should draw its conclusions is the evidence of the nature of the work that was done by Final Touch. It is clear from this evidence that the work done by Final Touch on the Lotto Centre project is not substantially different from the work the company performs under its maintenance contracts. For instance, the hours worked by the Final Touch cleaners are similar to the type of hours worked by cleaners under maintenance contract, and not similar to the hours worked by construction employees on this site.

26. The Board should not conclude that it is work in the construction industry simply

because it is done pursuant to a contract with a general contractor, and near the time of completion of a construction project. The Board should not place any weight on the inclusion of the work done by Final Touch in the general contract. The persons drafting such a contract may have a certain understanding of what can be considered construction work, but their understanding is irrelevant to the Board's determinations, which are based on principles which have been developed through its caselaw.

27. Counsel stated that Ellis Don does not rely on the specialized knowledge of cleaning techniques and solvents referred to in Goodall's evidence, as distinguishing the work from construction work. Rather, the company relies on the overall nature of the work, which is in contrast to the nature of work undertaken by construction trades.

28. With respect to the alternative argument put forward by the Labourers, counsel disputes that the provincial collective agreement covers anything but work in the construction industry. The Preamble refers to employees of employers "engaged in construction". The recognition clause speaks of "construction labourers", and the "construction industry".

29. Further, Article 2.05 cannot be read literally to include anything but construction labourers work, because if it were, it would include *all* work covered by an ICI general contract, including, for instance, electrical work, plumbing work, etc. It must be read in context, and the context dictates that it covers work of construction labourers in the construction industry in Ontario.

III

30. We are satisfied that the work which was performed by Final Touch is work in the construction industry. We accept, however, that the general intent of the agreement is to govern construction industry work. Essentially, we find ourselves unable, as urged by Ellis Don, to distinguish between the type of cleanup that construction labourers performed on this project, from the type of cleanup performed by the employees of Final Touch on the basis that the former is construction work whereas the latter is not.

31. All of the cleanup work, whether done by construction labourers or by employees of Final Touch, was on a construction project, while construction was still continuing. The work of both groups of employees came under the ultimate responsibility of Ellis Don, the general contractor. The work of both groups of employees overlapped in timing and complemented each other. As the cleanup work was the ultimate responsibility of Ellis Don, Ellis Don's supervisors were involved to some degree in overseeing the performance of the work. The degree of direct supervision was obviously much greater where the work was performed by Ellis Don employees. However, Ellis Don supervisors were responsible for giving instructions to Final Touch as to the timing of its work and for inspecting the work during its progress. It would be artificial to characterize some aspects of the cleanup work over which Ellis Don had responsibility as construction industry work, and other aspects of it as outside the construction industry.

32. The example of the cleaning of UPS power boxes illustrates the artificiality of making a distinction between the work performed by construction labourers and the work performed by Final Touch employees. Rather than suggesting a difference between cleaning which is part of construction work and cleaning which is not construction work, as submitted by counsel for Ellis Don, the example shows how all the cleaning work done under the general contract was part of a continuum of work, for the same general purpose.

33. We do not find much significance in the fact that the nature of the work performed by

Final Touch employees on this project is similar to the type of work which they perform under maintenance cleaning contracts. There may well be many similarities between work performed in the construction industry, and maintenance work. In *The Master Insulators' Association of Ontario, Inc.*, [1980] OLRB Rep. Oct. 1477, the Board found on the evidence that the same tools, materials and skills were used by insulators whether the work was new construction or what was found by the Board to be maintenance work. Instead of focusing on the nature of the work itself, the Board applied a purposive approach in defining the distinction between maintenance and repair (which is construction work), stating:

... Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work...

34. We prefer to apply a similar purposive approach to the case before us. There is no dispute that the overall project is a construction project, whose purpose was the erection of a building for the government of Ontario. Although the work of Final Touch was not directly related to the physical erection of the building, it was necessitated by it, just as, for instance, the erection and maintenance of site offices was necessitated by the project of erecting the building. Further, the final cleanup of the effects of construction is a necessary aspect of making the building ready for use as intended.

35. Maintenance cleaning can also be seen as essential in order for a building to be used for the purpose for which it is intended. However, as stated in *The Master Insulators' Association of Ontario, Inc.*, *supra*, maintenance work is work that assists in preserving the functioning of a system. Here, the building had not yet been used. The cleaning performed in this case was not for the purpose of preserving the functioning of the building, but was for the purpose of enabling the owner to begin using the building after its erection.

36. In coming to our conclusions above, we find it significant that the work performed by Final Touch was included in the general contract. We agree with the general proposition that the Board is not bound by an agreement by the parties to characterize work as "construction" for the purposes of the Act, where it is clearly not. However, the inclusion of the cleaning work in the general contract is an indication of the integration of this work into the general obligations undertaken by Ellis Don to construct the Lotto Centre. Ellis Don would not have undertaken an obligation to have maintenance cleaning performed after the building was constructed, because clearly, this has nothing to do with its obligation to construct the building. It did accept the obligation to have *this* cleaning work performed, because this cleaning work was related to the construction.

37. We do not view it as desirable to use the certificate of substantial performance or of total performance as a complete measure of whether work should be characterized as construction work. However, to the extent that these certificates represent indicators as to the progress of construction work, they are useful in order to place the disputed work in context. It is thus also relevant in the case before us that the work of Final Touch was for the most part completed prior to the issuance of the certificate of substantial performance. It lends support to the characterization of this cleaning work as part of the overall construction work undertaken. From the evidence, it appears that work which was performed after February 19, 1992 was "deficiency" work. This was how Goodall described it, and from the evidence, it appears analogous to the type of deficiency work that other sub-contractors might engage in after the date of substantial performance.

38. Having found the work that was sub-contracted to Final Touch to be work in the construction industry, we are also satisfied that it is covered by the terms of this agreement, in particular, Schedule "E". We thus find that the work performed by Final Touch is covered by the provin-

cial collective agreement between the Labourers and Ellis Don and that Ellis Don is in violation of Article 2.05 by failing to subcontract the work to a company in contractual relations with the Labourers.

39. In light of our findings, we find it unnecessary to rule on the alternative arguments relied on by the Labourers with respect to the interpretation of Article 2.05 and its application to work outside of the construction industry.

40. We remit the matter back to the parties to attempt to resolve the issue of remedy and, if appropriate, quantum of damages and remain seized of these issues failing their agreement.

DECISION OF BOARD MEMBER F. B. REAUME; July 29, 1993

1. I dissent from the majority decision.

2. It is not uncommon in the industry for owner/clients to include the Final Clean-up in the General contract for their own reasons. No significance other than owner/client preference, can be attributed to this practice.

3. Construction clean-up or housekeeping is clearly distinguishable from the final clean-up required for human occupancy whether it is for workplace or for residence. Construction clean-up is concerned with basic removal of waste material, lunch room debris, and general debris, with emphasis on workplace health and safety.

4. The final clean-up, is concerned with the "spic and span" look required for human occupancy and requires more attention to detail. There is no particular emphasis on the safety of personnel in the area. There is a clearly distinguishable line between construction clean-up and final clean-up.

5. Normally the final clean-up would commence on or about the time of substantial completion and be completed by the final completion date. Once an area is given it's final clean-up that area would normally be locked up until occupancy. In this case the owner required temporary use of some of these areas before final completion and requested further clean-ups after they were finished. While I do acknowledge that some of the work performed by Final Touch could be construed as construction clean-up, the final clean-up is not construction clean-up work.

6. There is no difference in the final clean-up of a newly completed building or the clean-up required to reactivate a vacant building for use. The work is clearly in contrast to the work of construction trades clean-up and is best classified as building maintenance which is performed in the absence of construction trade personnel.

7. This decision will encourage owners to do their own final clean-up or to utilize the services of a non-affiliated general contractor which could cause the loss of employment for union members. Furthermore this decision could have serious effects on the tendering process and the ability of the unionized contractor to compete with those contractors not so restricted.

8. With respect to the union's alternate argument, I concur with the argument that Article 2.05 cannot be read literally to include anything but construction labourers' work (see para 29).

9. For all of the above reasons, I would dismiss the grievance.

1812-92-U United Brotherhood of Carpenters and Joiners of America, Local 1072, Applicant v. General Wood Products, Responding Party

Construction Industry - Change in Working Conditions - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Employer violating "statutory freeze" in failing to contact union office when it needed new employees and in failing to pay wages and benefits required by collective agreement - Employer directed to compensate union on behalf of its members - Employer operating entirely outside terms of agreement during period of bargaining - Employer failing to make every reasonable effort to make a collective agreement - In circumstances of this case, however, Board preferring to allow bargaining process to continue rather than to impose settlement on the parties under section 91(4)(d) of the Act - Parties directed to meet and bargain in good faith

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *N. L. Jesin* and *W. Oliveira* for the applicant; *Fred Meyerhofer* and *Alan Ketteringham* for the responding party.

DECISION OF THE BOARD; July 26, 1993

1. This is a complaint made pursuant to the provisions of section 91 of the *Labour Relations Act* in which the applicant, the United Brotherhood of Carpenters and Joiners of America, Local 1072 ("Local 1072" or "the union") alleges that General Wood Products ("the company" or "General") violated various provisions of the Act. The union relies on sections 15, 65, 67, 71 and 81 of the Act. In short, the union alleges that the company has bargained in bad faith, interfered with the bargaining rights of the union, discriminated against employees associated with the union, intimidated employees associated with the union and contravened the freeze provisions of section 81 after the termination of the collective agreement.

2. The company was not represented by counsel. The Board explained to Mr. Fred Meyerhofer, the owner of the company, the role of the Board and the nature of these proceedings. The Board explained that it is an adjudicative body. It is not the role of the Board to advise the parties on how to proceed. It is the responsibility of parties appearing before the Board to present their case, through evidence and submissions. The Board did, however, outline the general procedures of calling evidence, cross-examination and submissions. The Board also outlined the nature of the legal issues before it in this case on which it anticipated the parties would be presenting their evidence and submissions.

I

3. The union called two witnesses, Walter Oliveira (the Business Manager for the applicant) and Rocco Difrancesco. Fred Meyerhofer testified for the company. Ultimately, much of the evidence is not in dispute. Where there are conflicts in the evidence which are significant to our determinations, we have assessed what is most probable in the circumstances, having regard to the evidence as a whole. All of the witnesses were credible and straightforward in their testimony.

4. The company is engaged in the business of woodworking, manufacturing store fixtures and other types of cabinetry. At one time, it has employed up to 15 shop employees. However, in recent years, it has only had enough work for two or three steady employees. Meyerhofer is a carpenter himself and states that he has been a union member for more than forty years.

5. The union and the company have been party to a collective agreement for many years,

at least as far back as the mid-70's. Local 1072 is the successor to Local 27 of the United Brotherhood of Carpenters and Joiners of America, which in turn is the successor to Local 2679 as a result of a merger in 1989. There is no dispute that Local 1072 holds the bargaining rights which had previously been held by Local 27 and before that by Local 2679 with respect to the shop employees of General.

6. The most recent collective agreement which has been signed by the parties (General and Local 2679) indicates that it is effective April 17, 1988 until April 16, 1990, and from year to year thereafter, unless notice to terminate or negotiate is given prior to the termination date.

7. Local 1072 is also party to a collective agreement with the Canadian Woodwork Manufacturers Association. Historically, although General has not been party to the Association agreement, it has waited until negotiations between the union and the Association have been concluded, and adopted the same provisions. When the Association concluded a new agreement for 1990-1992, General agreed to adopt the new wage schedule contained in the Association agreement.

8. It appears, therefore, that the agreement of 1988-90 continued to be in effect from year to year after April 16, 1990 and the parties agreed to adopt a new wage schedule corresponding to the Association agreement for the period 1990-92.

9. On January 30, 1992, the union gave notice to the company that it wished to negotiate a further collective agreement. The company responded by requesting some time before beginning negotiations, citing a recent operation of Mr. Meyerhofer and the fact that work was "at a stand still due to the present economic situation." The union agreed with the company's request, although it is unclear for how long the parties agreed to delay bargaining.

10. In early March of 1992, Oliveira was informed that the employees of the company had been laid off. At that time, the company had only two employees in the bargaining unit, Rocco Difrancesco and Luca Sportelli. Difrancesco had been with Meyerhofer for some 30 years, though not always with this company. Shortly afterwards, Sportelli, who was the shop steward, told Oliveira that although both employees including himself had been laid off, he believed that the company was continuing its operations with non-union employees.

11. At some point, a policy grievance was filed with respect to this, although we have no evidence as to the date of this grievance. The present complaint is dated September 22, 1992. Oliveira testified that no collective bargaining took place between the parties until after the complaint was filed. As a result of the filing of the complaint, and through the efforts of a Labour Relations Officer of the Board, the parties agreed to meet to negotiate.

12. On November 26, Oliveira, the two employees and Meyerhofer met at the union's office. At this meeting, Meyerhofer presented the union with a proposal, consisting of the following:

This is a contract agreement between the above mentioned, General Wood Products c/o F & H Store Fixture Limited and the United Brotherhood of Carpenters and Joiners of America Local Union 1072 for the purpose of supplying work for Mr. Rocco De Francesco and Mr. Lucas Sportelli for a period of two (2) years from November 26, 1992 at an hourly shop rate of \$12.00 per employee.

Said contract would begin as soon as there is work available for the above mentioned two employees.

The employees would work in all aspects of carpentry work including shop and installation.

The salary would include the benefits paid under the Ontario Labour Code, namely, Employers Health Tax, holiday [sic] pay and the Workers Compensation Board dues. All other benefits would be excluded from this contract.

The employees would also be in agreement to work in the same premises with a non union shop, as the Owner has rented out part of his shop to a non union organization due to slow economic conditions.

13. The proposal by the company would have eradicated virtually all of the terms of the agreement in effect until April 16, 1993. In addition, the wage rate offered was almost \$5.00 less than the most recent top wage in effect between the parties. Benefits were eliminated.

14. The union told Meyerhofer that the proposal was not acceptable, and that it wanted him to accept the Association agreement, as he had always done. Oliveira gave him a copy of the Association agreement for 1992-94, which had been concluded in May of 1992. Oliveira also indicated that the union would be prepared to make some concessions on wages, and could agree to the last rate under the 1988-90 collective agreement. Meyerhofer agreed to consider the Association agreement.

15. At the meeting of November 26, the union also raised the issue of non-union employees that it believed the company to be using. Meyerhofer acknowledged engaging, in addition to Difrancesco and Sportelli, three employees on one job after the layoffs. The job was the manufacture and installation of store fixtures for a store in St. Catharines, and was performed in August of 1992. These additional employees were not paid according to the collective agreement. Difrancesco was paid his regular wage, and we have no evidence as to the wages paid to Sportelli on this job.

16. In fact, although the evidence is sketchy, it appears that the company has been using other persons to do various work, sporadically throughout the entire period from the layoffs to the present. Meyerhofer states that he does not consider these persons employees, since he only engages them for a few hours or a day or few days at a time. Also, he pays these persons a fixed sum for each job, which has no relation to the hourly rates fixed by the agreement. The company has paid no dues on behalf of these persons, nor made remittances to the benefit plans.

17. The collective agreement states that senior employees are to be given preference in recall from layoff. Further, it states that when "new employees are required, the Employer agrees first to contact the Union office for help." The company has never contacted the union with respect to these short term jobs.

18. Meyerhofer states that he has called Difrancesco and Sportelli in for work. He offered them work on the St. Catharines job. He was told, however, and understands that they are not interested in work of short duration. He has thus not contacted them with respect to any of the other work the company did. Difrancesco testified that he was called once for work. At the time, he had a steady job and General was only offering a few days of work so he did not return. He continues to be interested in working for the company.

19. On December 4, Meyerhofer delivered to the union a further proposal. This proposal was a vast improvement over the proposal of November 26, in that it contained many of the provisions of the previous collective agreement, and of the Association agreement given to Meyerhofer by Oliveira. There were, however, still significant differences. The wage offer, which had been increased from \$12.00 to \$13.00 still represented a sizeable wage cut. The proposal contained no payments to the union's benefit trust funds or pension fund, nor any benefits whatsoever. The cost

of living allowance was removed. There were changes to a number of other provisions as well, including union security.

20. The union responded by rejecting this further offer. Oliveira called Meyerhofer and asked if the company was prepared to negotiate further. Meyerhofer replied that it was not and it could not afford anything else since there was no work. Essentially, he did not see the point of continuing negotiations, since even if the agreement were signed, neither Difrancesco nor Sportelli would have any work until the company was able to get some jobs.

21. Since that conversation, Oliveira has visited the company's premises on a few occasions and observed persons doing work which appeared to be bargaining unit work. He confronted Meyerhofer with this. Meyerhofer explained that he was renting out part of his premises to another individual, who occasionally engaged employees to do work. He also acknowledged that the company has done work on at least one occasion of very short duration. The union has received neither dues payments nor benefit trust remittances for this work. Although Meyerhofer characterized some of this work as "sub-contracts", we are satisfied on the evidence (scant as it is) that the persons performing the work were in essence employees paid on a lump sum basis instead of an hourly wage.

22. Meyerhofer testified that over the last few years, the business of the company has catastrophically declined. The company is at the limits of its borrowing power. A few years ago, Meyerhofer took out a second mortgage on the building, which he owns, and does not believe that he could even sell it for the value of that mortgage on today's market. There is much more non-union competition than there has been in the past, and the company is simply not getting enough work. Even what work has been done, such as the St. Catherines job, has been at a loss. Meyerhofer denies that he is anti-union and states that he has been associated with the union (or other similar unions) for at least 45 years. He states that to the extent the business is in crisis, it is not caused by the collective agreement, but the lack of work.

23. Meyerhofer candidly testified that he would prefer not to be a unionized company now. His reason is, among other things, that he is hoping to sell the business in order to be able to retire on the proceeds (he is 62 years old). He does not believe that he could sell the business if it was unionized. After his decades of association with the union, he states, he is looking for a "divorce". In these economic circumstances, he stated, it "makes no sense" to sign a contract with the union.

24. On the other hand, Meyerhofer states that he was prepared to sign an agreement containing the terms of the company's offer of December 4.

25. The Board was informed that sometime this spring, a "no-Board" report was issued.

II

26. The union alleges that the company has violated sections 65, 67 and 81 by its actions. These sections provide:

65. No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

27. Section 81 has been called a “statutory freeze”. Among other things, it applies once notice to bargain has been given and a collective agreement has expired. Section 81 preserves the pattern of operations of a business during the period in which a union and an employer are negotiating for the renewal of the collective agreement. The purpose of this provision is to provide for a fixed point of departure for negotiations by preventing an employer from unilaterally altering the status quo even when the collective agreement has expired. This prohibition against unilateral changes expires once the parties are in a strike or lock-out position.

28. In the case before us, the collective agreement expired on April 16, 1992. Since the layoffs of Difrancesco and Sportelli occurred prior to the onset of the freeze, section 81 has no application. We also find that the initial layoffs, on the evidence, do not violate the other sections of the Act relied on. It is clear that General did not have the work to sustain the employment of full-time carpenters and this evidence was not challenged by the union. We cannot find that the decision to layoff Difrancesco and Sportelli was motivated by reasons other than financial necessity.

29. In fact, the focus of the union’s case was primarily the actions of the company after the layoffs. In the union’s submissions, when faced with serious financial problems, the company

engaged in illegal self-help to resolve them, by operating outside of the terms of the collective agreement, instead of engaging in frank negotiations with the union.

30. Many of the cases involving the application of section 81 deal with actions taken by an employer under its general managerial authority. The issue in those cases is whether decisions taken during the period of the freeze are consistent with employment patterns in place before the freeze. Here, the actions complained of relate to the failure by the employer to apply the wages and other terms of the collective agreement. Where the terms which a union seeks to enforce are found within the very provisions of an expired collective agreement, it is hard to conceive of a clearer indication of the pre-existing employment patterns in place before the freeze.

31. On the evidence, after April 16, 1992 and continuing to the expiry of the statutory freeze, the employer engaged employees to perform work, but failed to pay the wages and benefits required by the collective agreement. The employer also failed to first contact the union office for help when it needed new employees, as required by the collective agreement. The collective agreement also requires that senior employees be given preference in recall. We find the company in violation of section 81 by failing to contact Difrancesco and Sportelli when it had work, from April 17, 1992 to the expiry of the freeze period. Although it is possible that these two employees may not have been available for every job, given the collective agreement, they should have been given the first opportunity to do the work.

32. With respect to the violation of section 81 of the Act, we order the company to compensate the union on behalf of its members for its failure to contact the union for employees, for its failure to give preference to Difrancesco and Sportelli in recall, and for its failure to pay wages and benefits according to the terms of the agreement. We leave the issue of the amount of compensation to the parties to resolve and remain seized in the event that they fail to agree. Although we direct payment of damages arising out of the violations of the Act, the amount of damages will have to be assessed having regard, amongst other things, to whether the union's members would have been available to work had it been offered to them.

33. As a result of our findings under section 81, we do not need to consider whether the company's failure to apply the terms of the expired collective agreement constitutes a violation of sections 65 and 67 of the Act.

III

34. Section 15 of the Act states:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

35. The obligation contained in section 15 is the obligation to *bargain*. It does not require an employer to agree to proposals put forward by a union; neither does it require a union to agree to the proposals by the employer. Section 15 does require, however, that when it is time to re-negotiate a collective agreement, the parties meet with the common objective of reaching an agreement. In *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49 the Board described the content of the duties contained in section 15 thus:

...

The section [section 15] imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement.

Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective -- that of entering into a collective agreement and section 14 [now section 15] is intended to convey this obligation. But this is not to say that they will or are obliged to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter into a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

14. But the preceding observations demonstrate that a very important function of section 14 [now section 15] is that of reinforcing an employer's obligation to recognize a trade union lawfully selected by employees as their bargaining agent. Certainly the freedom to join a trade union of one's choice declared in section 3 of the legislation would be but an edict "writ on water" if an employer could enter into negotiations with no intention of ever signing a collective agreement. But we believe the duty to meet and make every reasonable effort to make a collective agreement has an even more important function in a modern society that for the most part accepts that trade unions have legitimate and important roles to play. That is to say that the duty assumes that when two parties are obligated to meet each other periodically and rationally discuss their mutual problems in a way that satisfies the phrase "make every reasonable effort", they are likely to arrive at a better understanding of each other's concerns thereby enhancing the potential for a resolution of their differences without recourse to economic sanctions -- the impact of which is never confined to the immediate parties of an industrial dispute. At the very least rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the "true" differences between them. ...

15. Hence it is our belief that the duty described in section 14 [now section 15] has at least two principle functions. The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.

36. Further, the obligations contained in section 15 require an employer to engage in a frank discussion with respect to impending business decisions which have a significant impact on its employees. In *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261, the Board discussed this principle in the context of a decision by an employer to subcontract a substantial portion of the work performed by employees in the bargaining unit:

...

40. We do not think the duty to bargain about a major subcontracting decision imposes an unreasonable or unfair burden upon the employer involved. It does not unduly restrain him from formulating or implementing an economic decision to terminate a phase of his business operations, nor does it obligate him to yield a union's demand that the subcontract should not be let, or should be let on terms inconsistent with management's business judgment [sic]. The duty to bargain is not an obligation to agree. It is a requirement to engage in a full and frank discussion with the employees' representative, and make a bona fide effort to explore alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and his employees. If such efforts fail, the employer remains free (absent other unfair labour practice considerations based upon anti-union animus) to go forward with his decision. But experience has shown that candid discussion about mutual problems by labour and management frequently result in their resolution with attendant benefit to both sides. A union con-

fronted by a proposed loss of jobs can often make a useful contribution to the decision-making process. The recent bargaining in the automotive industry provides a good example. Business operations can profitably continue, and jobs may be preserved. And as Professor Cox has observed:

“Participating in [collective bargaining] debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strength or weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other’s convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion.”

(See: Cox, *The Duty to Bargain in Good Faith*, 71 Harv. Law Rev. 1401.) In our view, prior discussion of decisions of this nature is all that the Act contemplates. But it commands no less.

37. The facts in *Sunnycrest Nursing Homes Limited* are quite different from those in the case before us. However, the general principles of “full and frank discussion” are useful. It is difficult to view this obligation to engage in full and frank discussion having been met by an employer who decides to operate entirely outside of the terms of the agreement during the period of bargaining.

38. We are left with mixed signals from this employer as to whether it genuinely recognizes and wishes to comply with its obligations to bargain in good faith. On the one hand, it is clear that since February 1992, it has sought to ignore its obligations to the trade union under the collective agreement. By its own admission, it has undertaken work outside the terms of the agreement. Its actions suggest, and Mr. Meyerhofer’s statements confirm, that the company wishes to exit from this collective bargaining relationship. The means by which it has tried to achieve this is to simply operate as though the union did not exist.

39. On the other hand, the company responded to the union’s proposal of the Association agreement with a detailed proposal which it states it was prepared to sign. However, after this offer, the company has retreated and resisted further attempts to negotiate.

40. On balance, we find that the company has not made “every reasonable effort to make a collective agreement”. It made no attempts to negotiate with the union until after this complaint was filed. Before and after the complaint was filed, it continued to run its business, sporadic as it was, outside of the terms of the collective agreement (which are preserved for the duration of collective bargaining by section 81). After it agreed to meet with the union to negotiate, it presented two proposals containing roughly 30% cuts to the wage and benefits package. Mr. Meyerhofer seemed to indicate to the union that the proposal of December 4 was the company’s last offer. Yet, in the face of such major changes to the collective agreement, the company made no attempt to review its proposals in detail and explain the basis for them. Against the context of an Association agreement whose terms the company had always adopted, the company made no attempt to provide a substantive rationale for the radical departure from that agreement that it was now proposing. Further, the company continued to maintain that there was no point in negotiating since there was absolutely no work, when the evidence suggests otherwise. Although there does not appear to be enough work to sustain any full-time employees, the company has from time to time since February of 1992 hired persons who would normally be covered by the terms of the agreement.

41. We are left with the impression that the company has generally resisted the efforts of the union to negotiate a new collective agreement. Only when compelled to, by the filing of this complaint, did it make any attempt to put its mind to the issue. Even then, it is clear that its commitment to negotiate was short-lived.

42. This case is different from some of the other cases in which the Board has applied section 15, in the sense that it involves a small business with a long-standing union association. It appears that the parties have had a trouble-free relationship over the years, and the company cannot be accused of having any ideological or intransigent aversion to dealing with the union. Rather, it appears that the company was driven by desperate economic circumstances to try and back out of its relationship with the union. Union counsel refers to the actions of the company as constituting “self-help”. We agree with this characterization. The company seems to hope that by ignoring the union and its obligations under the agreement and the Act, the union might abandon the relationship.

43. There is no place for such “self-help” under the agreement and the Act, however. It is not for an employer to decide that a collective bargaining relationship is over. As long as the employees wish to have a union represent them in their employment relations and the union is prepared to do so, the company must comply with its obligations under the Act and recognize the right of the union to act on behalf of its employees.

44. We therefore find that the company has violated section 15 of the Act.

IV

45. We turn to a consideration of the applicant’s request that if the Board finds a violation of section 15 of the Act, we impose as remedy a collective agreement containing the terms of the 1992-94 Association agreement. We indicated to the parties at the outset of the hearing that as the power to settle one or more terms of a collective agreement is a new remedial power under section 91, we were interested in hearing full submissions as to when this power should be exercised. Union counsel submitted that this was an appropriate case in which to exercise this remedial power. Counsel indicated that if the employer had made any attempt to bargain, it might be appropriate for the Board to review each term of the collective agreement separately. However, in this case, the employer has made no reasonable proposal to the union. Further, the history between the parties is that the Association agreement has always been considered acceptable. In these circumstances, the Board should order the employer to sign the most recent Association agreement.

46. Section 91(4)(d) provides:

91.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers’ organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers’ organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

47. As set out above, section 91(4)(d) permits the Board to settle one or more terms of a collective agreement upon finding a violation of section 15, “if the Board considers that other remedies are not sufficient to counter the effects of the contravention.” The wording of the section indicates that the imposition of one or more terms of an agreement is a *remedial* measure which should be taken where other remedial measures are inadequate. The section directs the Board to consider the effects of the contravention and how they can be countered.

48. What are the effects of the contravention in this case? Arguably, but for the company's failure to bargain in good faith, the parties might have reached agreement. However, the Board recognizes that even parties who bargain in good faith may not agree. The effects of a failure to bargain in good faith are thus not necessarily, in a given case, the failure to reach agreement. Neither are the effects of a violation of section 15 necessarily *limited* to the failure to reach an agreement. It may be that a company's conduct has resulted in a weakening of the bargaining position of the union, for instance, by undermining the support of the employees for the union. If this were the case, then a remedial order simply directing the respondent to bargain in good faith might be inadequate to effectively counter the effects of its violation. In such a case, the Board may find it appropriate to settle one or more terms of an agreement.

49. We do not find this to be a case where an employer's conduct during bargaining has so undermined the process of collective bargaining that it is unlikely that the parties could now engage in bargaining on a reasonable basis as they might have had the employer not violated the Act. Here, the parties have only met once for bargaining. In fact, it appears that, for the most part, real negotiations have yet to take place. Both parties have shown, at some point in the process, a willingness to consider the other's proposals. However, because of the refusal by the employer to continue with the process, the parties have not had the opportunity to explore each other's positions further. Also, because of the employer's unwillingness to be frank as to its continuing activities, the parties have not dealt with each other with the full information required for meaningful collective bargaining.

50. Partly because of the scant time these parties actually devoted to bargaining, and also because of our assessment of this employer we cannot conclude that this employer will not meet with the union and negotiate in good faith to reach an agreement under the Board's direction to do so and with an understanding of its obligations in this regard. In the circumstances of this case, we prefer to allow the bargaining process to continue rather than to impose a settlement on the parties. Where we see a reasonable probability that the parties can find their own solutions to the difficult economic circumstances that have an impact on the interests of both sides, we hesitate to bypass this process and dictate a result.

51. The characterization by the union of this employer's conduct as "self-help" supports our remedial order with respect to section 15. The complaint by the union is that this employer took matters into its own hands rather than dealing with the union. Counsel for the union stated that the union has an understanding of the difficult economic circumstances, and could have addressed these in bargaining if it had been given the opportunity.

52. The Board therefore directs the employer to meet with the union forthwith, bargain in good faith, and make every reasonable effort to conclude a collective agreement.

53. The Board emphasizes that the Act requires the parties to meet to bargain in good faith and requires them to make every reasonable effort to make a collective agreement. The lack, or scarcity, of work does not relieve the employer of this obligation. Although there may be circumstances where parties might *agree* to suspend bargaining until there is work available, in this case, the union wishes to settle the terms of the agreement despite the absence of much work. It is entitled to negotiate for a renewal agreement even in these circumstances and, reasonably, wishes to know what terms and conditions of employment will apply if business improves. Further, as we have outlined above, the obligation to bargain in good faith requires the parties to engage in full and frank discussion, in order for the process to have any meaning. There must be a willingness to discuss positions taken and provide their substantive rationale.

54. Although we decline to grant the remedy requested by the union, and direct the

employer instead to fulfill its obligations under section 15, we are aware that there is a possibility that this will not end the matter. Our findings as to remedy in this case do not preclude the union in a future application, if it establishes that the employer has failed to comply with its duty to bargain in good faith under this order, from requesting a remedy under section 91(4)(d). In any future application, the union will be able to rely on our findings that the employer has bargained in bad faith. The Board may well find it appropriate at that time to settle one or more terms of the collective agreement, or to impose the terms of the Association Agreement on the parties.

55. To summarize the above, the Board therefore makes the following remedial orders and directions:

- a. the Board declares that the company has violated section 81 of the Act by its failure to apply the wages and benefits of the expired collective agreement to employees working after April 16, 1992 and before the expiry of the period of the statutory freeze, by failing to contact the union first when it needed new employees and by failing to give senior employees preference in recall;
- b. the Board directs the company to compensate the union on behalf of its members for the violation of section 81;
- c. the Board declares that the company has violated section 15 of the Act in that it has failed to bargain in good faith and make every reasonable effort to make a collective agreement;
- d. the Board directs that the company meet with the union forthwith and bargain in good faith and make every reasonable effort to conclude a collective agreement.

56. The Board remains seized of the amount of compensation owing under these remedial orders, should the parties be unable to resolve it.

0888-93-R; 1142-93-M Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. **Highland York Flooring Company Limited** and Highland York Interiors Inc., Responding Parties

Construction Industry - Interim Relief - Practice and Procedure - Related Employer - Remedies - Sale of a Business - Union applying for interim orders directing pre-hearing production of relevant lists and documents - Orders issuing but Board noting that production orders may be made on written and properly particularized requests, including representations, without recourse to section 92.1 of the Act

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *J. Redshaw*.

DECISION OF THE BOARD; July 15, 1993

1. Board File No. 0888-93-R is an application, made on June 11, 1993, under sections 1(4) and 64 of the *Labour Relations Act*. In it, the applicant trade union seeks a declaration that the responding employers carry on associated or related activities under common control or direction (and presumably that they therefore constitute one employer for purposes of the Act), a declara-

tion that there has been a sale of a business from one responding employer to the other, and other ancillary relief.

2. Board File No. 1142-93-M is an application, made on July 5, 1993, for an interim order under section 92.1 of the Act. More specifically the applicant requests the following interim orders:

1. The Respondents produce (at least seven calendar days prior to the hearing) to the Applicant and to the Board all documents pertaining to the corporate and business structure of Highland York Interiors Inc. and Highland York Flooring Company Ltd. Without limiting the generality of the foregoing, all Corporate Minutes, By-Laws, Articles of Incorporation, Directors, Resolutions, Shareholder Resolutions, Shareholder Agreements, Directors Registers, Shareholders Registers, Officers Registers, Share Transfer Registers, Share Certificates, filings with the Minister of Consumer and Commercial Relations pursuant to the Corporation Information Act, and any other agreements or notes reflecting agreements between any of the Shareholders, Officers or Directors of the Responding Parties.
2. The Respondents produce (at least seven calendar days prior to the hearing) to the Applicant and the Board all documents pertaining to any commercial transactions between Highland York Co. Ltd. and Highland York Interiors Inc. Without limiting the generality of the foregoing, all agreements, purchase orders, contracts, [sic] sub-contracts, leases, securities, guarantees between the Responding Parties and all agreements, contracts, subcontracts, leases, and guarantees entered into jointly by the Responding Parties.
3. The Respondents produce (at least [sic] seven calendar days prior to the hearing) any documents indicating a disposition by an [sic] mode whatsoever of the business, assets, goods, receivables, leases, equipment of Highland York Flooring Co. Ltd. to Highland York Interiors Inc.
4. The Respondents to provide a list of the following:
 - (a) premises owned, leased or occupied;
 - (b) equipment owned, leased or used;
 - (c) employees current and for last five years;
 - (d) business cards (a copy);
 - (e) name of accountant and bookkeeper;
 - (f) name of solicitor;
 - (g) customer list;
 - (h) phone and fax numbers used;
 - (i) all persons with authority to sign cheques;
 - (j) all signs indicating associated existence; and
 - (k) shares office equipment, sales personnel or employees
5. The Respondents to produce within seven calendar days of the hearing all documents not covered by paragraphs 1 through 4 which the Respondents intend to rely on at the hearing of this matter.

3. The application in Board File No. 1142-93-M was served on Highland York Interiors Inc. ("Interiors") July 2, 1993 and on Highland York Flooring Company Ltd. ("Flooring") on June 30, 1993. Neither responding employer has filed any response to the applicant's request for the interim orders it seeks, either within the time specified therefor in the Board's Rules of Procedure or otherwise. Both Interiors and Flooring have filed responses to the application in Board File No. 0888-93-R. Both responses appear to have been completed and signed by the same individual. The response filed by Interiors contains a blanket denial of the applicant's statements and nothing more. Flooring's response says nothing more than that it is "insolvent".

4. Section 104(13) of the *Labour Relations Act* empowers the Board to determine its own

practice and procedure. Section 105(2)(a.1) empowers the Board to compel “any party to produce documents or things that may be relevant to a matter before it ... before or during a hearing.” Most, if not all, cases benefit from pre-hearing disclosure of relevant documents.

5. Section 1(4) and 64 of the *Labour Relations Act* deal with the labour relations ramifications of business relationships or transactions. Both operate to modify common-law notions of separation between corporate or other entities, and about privity of contract. Preliminary disclosure is particularly helpful in cases of this type because they often turn on an assessment of commercial facts which are not often significantly in dispute. Detailed pleadings and pre-hearing disclosure permit the parties to identify and join issue on the factual and legal issues between them, and allows them to assess the respective positions. It also permits an assessment of the hearing time which may be necessary to deal with the matter and allows for more efficient case management by both the Board and the parties.

6. In addition to the provisions of the *Labour Relations Act* referred to above, section 1(5) and 64(13) of the Act provide that:

1(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

...

64(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

7. The documents and information which the applicant requests the responding parties be ordered to produce in this case are the kind of documents and information which are generally relevant in proceedings under sections 1(4) and 64. Further, production or disclosure of such documents or information in this case would serve to flesh out the material facts, identify the issues, and permit the application to proceed and be disposed of more efficiently and expeditiously. The responding parties have said little of substance in the responses they have filed to the main application, and have made no response to the applicant's request for the production order it seeks.

8. The Board sees no reason not to grant the orders requested. The Board therefore orders the responding parties to produce to the applicant, at least 7 calendar days prior to the first hearing day scheduled for this application, all the documents and information specified by the applicant as listed in paragraph 2, above. Any documents or information produced in response to this order are not to be used for purposes unrelated to this proceeding.

9. The Board wishes to note that it is not necessary to file an application for an interim order under section 92.1 of the Act to obtain the kind of production order the Board has made herein. Although the words of section 92.1 are broad enough to include this kind of request, it is sufficient and probably more efficient to make such a request in the “main” proceeding, provided that such a request is made in writing and with the proper specificity and particularity, including representations with respect to why the production order being requested is appropriate.

0254-93-R Canadian Brotherhood of Railway Transport and General Workers, Applicant v. Kingston Access Bus, Responding Party

Bargaining Unit - Combination of Bargaining Units - Remedies - Union representing full-time employees since 1987 - Union recently certified to represent part-time employees and applying to combine bargaining units - Board satisfied that combining units would facilitate viable and stable collective bargaining and reduce fragmentation without causing serious labour relations problems - Board directing that the bargaining units be combined and remaining seized of any issues arising out of implementation of its order

BEFORE: *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *B. L. Armstrong*.

DECISION OF THE BOARD; July 15, 1993

1. This is an application to combine bargaining units pursuant to section 7 of the *Labour Relations Act* in which the Board, by oral ruling dated May 25, 1993, directed that the bargaining units in question be combined. We now provide our reasons for the ruling.

2. Subsections 7(1) and (3) state:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

3. The bargaining units which are the subject of this application are a group of full-time employees and a group of part-time employees. The full-time bargaining unit has been represented by the union since 1987. The union received a certificate from the Board on May 18, 1993 with respect to the part-time bargaining unit.

4. Kingston Access Bus ("the company") opposed the combination of these two units. The representative of the company at the hearing in this matter submitted that the Board ought to give the parties time to negotiate a collective agreement covering the part-time workers, before sweeping them into the collective agreement covering the full-time workers. It was submitted that there is no reason to think that there will be serious labour relations problems as a result of having two separate bargaining units. It is premature in the relationship, at least with respect to the part-time bargaining unit, to conclude that it would facilitate stable collective bargaining to combine the two bargaining units.

5. In addition, it was contended that the union is attempting to achieve by Board direction what it could not get in bargaining, ie. the inclusion of part-time workers in the collective agreement. The granting of an order where the parties have engaged in bargaining over the issue and reached their own agreement would be disruptive to collective bargaining. Among other things, it would result in the re-opening of the full-time collective agreement in mid-term, which as it stands contains provisions which are completely inappropriate to part-time workers.

6. The Board carefully considered the arguments made against the consolidation of the two bargaining units, and concluded that a direction to combine them would facilitate viable and stable collective bargaining and reduce fragmentation without causing serious labour relations problems.

7. There is no doubt that the combined bargaining unit is one that the Act recognizes as appropriate for collective bargaining. Section 6(2.1) of the Act states:

(2.1) A bargaining unit consisting of full-time employees and part-time employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.

8. We accept therefore, as our initial proposition, that the combined bargaining unit is the *preferred* bargaining unit for the purposes of the Act. To the extent that the Legislature has expressed a preference for such a bargaining unit, we are satisfied that it would “facilitate viable and stable collective bargaining” and “reduce fragmentation of bargaining units” to direct the combination.

9. We do not view the fact that the parties have discussed the issue at the bargaining table and been unable to resolve it, to weigh against the order sought. It is well settled that in collective bargaining negotiations, a party cannot press to impasse a demand to change the bargaining unit configuration. Section 7 allows the Board to consider whether viable and stable collective bargaining would be enhanced by changes to the bargaining unit structure, even outside the realm of the parties’ agreement.

10. For the most part, the arguments of the company that a combination order would lead to serious labour relations problems relate, in our view, to concerns going to the *implementation* of such an order. The company is concerned that the terms of the full-time collective agreement are not appropriate to the part-time unit. It is also concerned that it might have to re-open its full-time collective agreement in mid-term. We are satisfied that these are not “serious labour relations problems”. To the extent that the parties will have to engage in negotiations over the terms and conditions that will apply to the part-time employees, they will have engaged in that process in any event, as a result of the recent certification of the part-time unit.

11. Finally, in our view, the potential mischief of re-opening the collective agreement covering full-time workers in mid-term (and it is not at all clear that this is a necessary result of the order here) is a consequence which is outweighed by the other factors in favour of directing the combination of these two units.

12. In addition to the order directing the combination of the two units, the union sought an order that the current collective agreement be applied to the part-time unit. For the most part, it is urged, the provisions which govern part-time employees are already the same as those that are contained in that agreement. The Board declined to make such an order, preferring to leave the negotiation of these matters to the parties. The Board therefore directed the two bargaining units to be combined, remitted the matter back to the parties and remains seized of any issues arising out of the implementation of its order.

1775-92-M International Brotherhood of Painters and Allied Trades (the "Painters"), Applicant v. Labourers International Union of North America, Ontario Provincial District Council (the "Labourers") and International Association of Heat and Frost Insulators and Asbestos Workers (the "Insulators") and **Metropolitan Toronto Demolition Contractors' Association** (the "Contractors' Association"), Respondents

Bargaining Rights - Construction Industry - Reference - Whether to amend designation orders of Painters' union and/or Labourers' union and/or Insulators' union by adding words "and employees engaged in the removal of asbestos" - Board not persuaded that any or all of the designations should be amended

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; July 9, 1993

I

Introduction

1. This is a referral to the Board by the Minister pursuant to section 141(4) of the *Labour Relations Act* ("the Act"). The questions posed by the Minister which have been referred to the Board essentially revolve around whether it is necessary and/or appropriate to amend the designation orders of the International Brotherhood of Painters and Allied Trades (the "Painters"), and/or the Labourers International Union of North America, Ontario Provincial District Council (the "Labourers") and/or the International Association of Heat and Frost Insulators and Asbestos Workers (the "Insulators") by adding the words "and employees engaged in the removal of asbestos".

2. In considering this referral by the Minister the Board had before it the written material which had been filed by the Painters, Labourers and Insulators with the Minister. Decisions of the Board (differently constituted) dated October 19th, 1992 and December 8th, 1992 also directed all interested parties to whom notice had been given to file with the Board a written Notice of Intention to Participate indicating *inter alia* the nature of its interest in the proceeding, its position with respect to the matters referred to the Board by the Minister, and a concise statement of material facts and representations. On February 24th, 1993 a further decision of the Board (differently constituted) directed the parties to file a detailed reply to the representations which had been made by the other parties. The parties were notified of the consequences which might flow if a party failed to file representations and were advised that any written submissions should be complete as the Board might decide to answer the questions asked by the Minister on the basis of the materials and representations filed and without an oral hearing. None of the parties requested that the Board conduct an oral hearing. As a result of the extensive written submissions and materials which have been filed, the Board determined that it was not necessary to hold a hearing. We are able to report our decision on the questions referred by the Minister without hearing any *viva voce* testimony or the oral submissions of the parties.

3. The referral to the Board by the Minister is as follows:

**IN THE MATTER OF A REFERENCE FROM THE MINISTER OF LABOUR TO THE
ONTARIO LABOUR RELATIONS BOARD PURSUANT TO SECTION 141(4) OF THE ACT**

**REGARDING A REQUEST BY A UNION FOR THE AMENDMENT OF AN EMPLOYEE
BARGAINING AGENCY DESIGNATION ORDER**

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES (THE
"PAINTERS")

-AND-

LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL
DISTRICT COUNCIL

(THE "LABOURERS")

-AND-

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND
ASBESTOS WORKERS

(THE "INSULATORS")

-AND-

METROPOLITAN TORONTO DEMOLITION CONTRACTORS' ASSOCIATION (THE
"CONTRACTORS' ASSOCIATION")

1. On March 29, 1978 the Minister of Labour pursuant to section 127(1)(a) of the *Labour Relations Act* R.S.O. 1970 designated the Painters and the Ontario Council of the Painters as the employee bargaining agency to represent in bargaining journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets or drywall tapers, plasterers, or fireproofing applicators in the industrial commercial institutional sector of the construction industry.
2. On April 28, 1978 the Minister of Labour pursuant to section 127(1)(a) of the *Labour Relations Act* R.S.O. 1970 designated the Insulators and the Insulators Local 95 as the employee bargaining agency to represent in bargaining journeymen and apprentice insulators and asbestos workers in the industrial, commercial institutional sector of the construction industry.
3. On April 21, 1978 the Minister of Labour pursuant to section 127(1)(b) of the *Labour Relations Act* R.S.O. 1970 designated the Labourers and the Labourers Provincial District Council as the employee bargaining agency to represent in bargaining construction labourers, including masons or bricklayers, tenders, and all employees engaged in cement finishing, water proofing or restorational work in the industrial commercial and institutional sector of the construction industry. The aforesaid designation order was amended by the Ministry of Labour on July 13, 1978, September 6, 1978 and September 30, 1983.
4. On January 23, 1986 the Minister of Labour pursuant to section 139(1)(a) of the *Labour Relations Act* R.S.O. 1980 designated the Labourers and the Labourers Ontario Provincial District Council as the employee bargaining agency to represent in bargaining construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the industrial, commercial and institutional sector of the construction industry of the province of Ontario.
5. On January 2, 1992 the Painters made application to the Minister of Labour to amend the employee bargaining agency designation order affecting the Painters by adding the words "and employees engaged in the removal of asbestos" following the words "fireproofing applicators" in the description of the bargaining unit covered by that designation order.

6. The Labourers Ontario Provincial District Council and the Insulators have advised the Minister that in their view the requested amendment is inappropriate and in the alternative have requested that if such an amendment is made to the designation order affecting the painters, that a similar amendment ought to be made to the designation orders affecting the Labourers and the Insulators.
7. Now therefore having regard to the circumstances outlined above and the request of the Painters, the Minister of Labour considers it advisable to refer the following questions to the Ontario Labour Relations Board pursuant to section 141(4) of the *Labour Relations Act*.
 - a) Is the proposed addition of the words “and employees engaged in the removal of asbestos” to the Painters’ employee bargaining agency designation necessary to permit that union to represent asbestos removers to the extent that the union otherwise has jurisdiction over asbestos removal work?
 - b) Notwithstanding the answer to a) above, is it appropriate to amend the Painters’ employee bargaining agency designation by adding the words “and employees engaged in the removal of asbestos” to the description of employees covered by that designation?
 - c) If the answer to b) above is yes, is it also appropriate to add the words “and employees engaged in the removal of asbestos” to one or more of the designation orders of the Labourers and its affiliates and the designation order of the Insulators and its affiliates?

The Position of the Painters’ Union

4. In its submissions the Painters assert that it represents “throughout the Province of Ontario, as many as 600 employees of some 15 contractors which are engaged in asbestos removal work, often in conjunction with fire proofing application work, applied in substitution for the removed asbestos. It is estimated that this represents in excess of 70 per cent of the work of asbestos removal in the Province of Ontario, with a similar percentage of the work being performed by members of the Painters’ union across Canada”.

5. The Painters’ union argues that an amendment to the designation is appropriate to reflect the existing bargaining realities. It submits that since 1979 it has bargained with the employer bargaining agency designated to represent the employers of its members in an effort to reach an all sector collective agreement to cover (among others) asbestos removers. Asbestos removal has been referred to in the provincial collective agreement between the Painters’ employee bargaining agency and employer bargaining agency since 1980. That agreement covers the industrial, commercial and institutional (ICI) sector. In 1987 the Board granted a certificate of accreditation to the Interior Systems Construction Association (a constituent of the Painters’ employer bargaining agency). This certificate of accreditation is with respect to the residential sector of the construction industry and refers specifically to asbestos removers.

6. It is further submitted by the Painters that their current designation which refers to “fireproofing applicators” includes asbestos removers but that for purposes of clarity and certainty an amendment to the designation to include an explicit reference to asbestos removers is preferable. In this regard the Painters’ assert that asbestos removal is a distinct and definable trade. In the alternative it is asserted that at the very least asbestos removal is a discrete facet of the construction industry which has gained prominence as a specialized segment of the construction industry since 1979 when the health hazards associated with asbestos came to be known. It is argued that the development of a definable trade or a discrete segment of the construction industry, together with the existing bargaining rights of the Painters with respect to employees employed as asbestos

removers, warrants an amendment to the designation order particularly when there is no specific reference to “asbestos removers” in any of the current designations of any trade.

7. The Painters acknowledge that both the Insulators and the Labourers also represent persons engaged in asbestos removal. It states that the Insulators pursuant to their existing designation order (which includes “asbestos workers”) represents persons engaged primarily with the removal of asbestos from mechanical systems (as opposed to architectural structures). The Painters state that the Labourers on the other hand represent persons engaged in asbestos removal employed primarily by “wrecking contractors and related employers” notwithstanding the fact that the Labourers’ designations do not refer specifically to asbestos removers. In recognition of these bargaining rights the Painters do not take the position that its designation order should contain the exclusive right to represent employees engaged in asbestos removal. It is content that a similar amendment be made to the designation orders of the Insulators and the Labourers.

8. In the result the Painters’ alternative positions to the three questions referred by the Minister are contained in their March 17th, 1993 reply submissions as follows:

The Painters’ position is:

1. THAT a Declaration by the Board that each of the 3 Designations, namely Painters, Labourers, and Insulators, covers Asbestos Removal, is acceptable. Thus in response to the question posed by the Minister in Paragraph 7 (a) of the October 19, 1992 Decision, the Amendment to the Designations would not then be essential in that by reason of its jurisdiction over Fireproofing (Asbestos) Application, the Painters have jurisdiction over its removal.

IN THE ALTERNATIVE

2. THAT to ensure clarity, to avoid disputes, and to reflect the Bargaining Reality, it would be desirable for each Designation to be amended to specifically include Asbestos Removal. Thus, with reference to questions 7 (b) and (c), posed by the Minister, the Amendment would be applicable to all 3 Designations.

IN THE ALTERNATIVE

3. IF the Board were to consider a recommendation to the Minister that: (a) The Painters’ Designation did not cover Asbestos Removal, but that (b) the Designation should not be amended to include Asbestos Removal; in those circumstances the Painters would wish to withdraw this Request for Amendment, for to do otherwise would place the established Bargaining Rights of the Painters in the I.C.I. Sector in jeopardy.

The Position of the Labourers’ Union

9. The Labourers oppose the amendment to the designation order sought by the Painters. On behalf of the Labourers it is submitted that there is no distinct and definable trade of asbestos removal. It is further submitted that the prevailing patterns of collective bargaining relationships do not support either the recognition of a distinct trade of asbestos removal or the recognition of a separate segment of the construction industry known as asbestos removal or abatement.

10. The Labourers assert that its current designations for “construction labourers” covers persons engaged in asbestos removal. It further asserts that asbestos removal work “is generally accepted to be work performed by a construction labourer”. The Labourers refer to its provincial collective agreement in the ICI sector, its provincial demolition agreement, and its collective agreement with the Electrical Power Systems Construction Association (through the Ontario Allied Construction Trades Council) and assert that each of these agreements cover persons employed as asbestos removers in all sectors of the construction industry.

11. The Labourers go further and take the position that

“the reference in the Painters’ designation order to ‘fireproofing applicators’ does not provide statutory authority for that union to conclude a collective agreement in the ICI sector on behalf of persons performing asbestos removal, a completely different type of work. To the extent that the Painters’ agreement purports to include therein persons performing work in the ICI sector that the Labourers have been designated to represent, in our submission that agreement is in contravention of the Act”.

12. In opposition to the amendment the Labourers argue that the amendment would create “another overlapping classification or trade within the provincial bargaining scheme”. It submits that such action would be inconsistent with the scheme of province-wide bargaining in the ICI sector which sought to stabilize collective bargaining in that sector through the recognition of existing bargaining rights and patterns and the establishment of a province-wide bargaining regime with respect to those existing rights. It is the position of the Labourers that to create another classification within the scheme and thereby disturb the *status quo* would “generate major and fundamental instability”.

13. In making these arguments the Labourers note that it also opposes the amendments sought by the Painters because it asserts the Painters have obtained bargaining rights for employees engaged in asbestos removal by “under-bidding” the unions which have “traditionally performed the work” through the negotiation of “vastly inferior” collective agreements. The Labourers therefore take the position that “such competition for bargaining rights [should not] be rewarded by an amendment solidifying the ‘gains’ purportedly made ...” as that would create an “incentive” ... for actions that will not contribute to the stability of the province-wide bargaining scheme”.

14. Finally, and in the alternative, the Labourers submit that if the Painters’ designation order is amended as requested its designation orders should be similarly amended.

The Position of the Insulators’ Union

15. The Insulators’ union also opposes the amendment requested. As a mechanical trade the Insulators represent persons who perform asbestos removal with respect to mechanical installations. Like the Labourers, the Insulators also take the position that asbestos removal is not a separate trade nor a distinct part of the construction industry. The Insulators also support the Labourers’ assertions that the Painters have negotiated “vastly inferior” collective agreements and in this way obtained bargaining rights and extended its jurisdictional claims. The Insulators submit that as a result of such pressure it has been necessary to negotiate “special” terms or conditions of employment and other “accommodations” for employees engaged in asbestos removal with those employers whose employees are represented by the Insulators’ union.

16. The Insulators’ question why an amendment is being sought by the Painters. On their behalf it is submitted that no valid reason or rationale has been advanced by the Painters to support the amendment. It is the Insulators’ position that the Painters seek the amendment not necessarily to reflect its existing representational rights but rather to enhance its work jurisdiction claims (this point is disputed by the Painters.)

17. Unlike the Labourers, the Insulators accept that the Painters’ current designation covers the work of asbestos removal as the Painters have been designated to represent “fireproofing applicators”. The Insulators acknowledge that this classification in the designation logically includes persons who remove fireproofing material including asbestos. In this regard the Insulators’ position differs from that of the Labourers. The Insulators’ submit that given the fact that the

Painters have represented asbestos removers for the past 12 to 15 years, and in view of the fact the designation of “fireproofing applicators” can and does include persons who remove fireproofing material, it is “simply too late to argue that it is now unlawful for [the Painters] to perform the work” or to assert that the collective agreement of the Painters is in contravention of the Act insofar as it purports to cover the work of asbestos removal. In this regard the Insulators note that to its knowledge, prior to the filing of the Painters’ request to the Minister the Labourers’ had *not* taken the position that representation of persons performing the work of asbestos removal by the Painters’ union was unlawful and beyond the scope of the Painters’ designation order.

18. The Insulators therefore argue that an amendment to the Painters’ designation order is not necessary. The persons who perform the work of asbestos removal are already properly described by the designation of all three trade unions. Each of the three trade unions do in fact represent such employees and have acquired bargaining rights for such employees.

19. Finally, and as an alternative the Insulators also request that if the Painters’ designation order is amended, its own designation order should be amended in a similar fashion in recognition of its representational rights and existing work jurisdiction claims.

II

Decision

Background

20. In our determination of the issues raised by this reference from the Minister there are a number of matters and certain undisputed facts which must be considered. These include:

- (a) the nature and purpose of the province-wide bargaining provisions of the Act;
- (b) the purpose of the designation orders;
- (c) the difference between representational rights and claims to jurisdiction;
- (d) the fact that the work of asbestos removal has increased significantly since the original designations were first established in 1978; and
- (e) the fact that each of these three unions currently represent persons engaged in asbestos removal.

21. We therefore commence with some general observations concerning the nature and purpose of the province-wide bargaining provisions and the designation orders.

22. The legislative purpose of the province-wide bargaining provisions of the Act (which were first added to the Act by the *Labour Relations Amendments Act*, [1977] S.O. c. 31 (“Bill 22”)) was “first to recognize existing bargaining rights and patterns in the ICI sector and then to structure around them a province-wide bargaining regime, the objective of which was to stabilize the collective bargaining process in this significant sector of the construction industry.” (See *Manacon Construction Limited*, [1983] OLRB Rep. March 407 at para. 30).

23. In *Lumber and Sawmill Workers Union, Local 2693*, [1987] OLRB Rep. Dec. 1556 the Board referred to the province-wide bargaining scheme in the following manner:

13. *Provincial bargaining in the ICI sector is structured essentially on a multi-employer single trade basis.* There are, however, a number of departures from the principle of single-trade bargaining. These exceptions reflect the fact that at the time provincial bargaining was introduced, certain construction trade unions represented ICI employees outside of their “normal” trade or classification. For example, the Labourers Union represented units of plasterers as well as units of employees engaged in restoration and waterproofing work, often referred to as “steeple-jacks”, both of which groups had traditionally been represented by the Operative Plasterers and Cement Masons International Association of the United States and Canada. Because of this, the designation for the labourers employee bargaining agency covers not only labourers, but the other two classifications as well. Similarly, in recognition of the fact that the International Union of Bricklayers and Allied Craftsmen has traditionally represented plasterers in certain parts of the province, the bricklayers employee bargaining agency designation refers to plasterers as well as to bricklayers and stonemasons.

(emphasis added)

24. Generally however the thrust of the current designations is to encourage *single trade* bargaining by the designated employer and employee bargaining agencies (EBA’s). As a result of this emphasis on single trade bargaining the designations upon which the scheme of province-wide bargaining is founded are generally based on a “craft” rather than a task or work function basis. In its decisions the Board also strives to promote the concept of single trade bargaining by the designated EBA’s. Thus, in the ICI sector, the Board dismisses applications for certification by building trades “across craft lines”. That is to say, union’s bound by the scheme of province-wide bargaining cannot represent classifications of employees not referred to in their designation orders (see *Manacon Construction Limited, supra*, application for reconsideration dismissed, [1983] OLRB Rep. July 1104).

25. Again in *Lumber and Sawmill Workers Union, Local 2693, supra*, the Board expressed this concept as follows:

15. Section 146(2) prohibits an affiliated bargaining agent from entering into a collective agreement that is not a provincial agreement. The wording of this section has led the Board to conclude that a local of a building trades union which meets the definition of an affiliated bargaining agent cannot enter into a valid collective agreement for a trade or classification not referred to in the relevant employee bargaining agency designation. Following from this conclusion, the Board has on a number of occasions dismissed applications for certification by building trades unions “across craft lines”. Accordingly, bargaining rights for an unrepresented unit of employees in the ICI sector can only be obtained by the building trades union designated to represent the trade or classification involved, (i.e., bricklayers can only be represented by the Bricklayers Union), or by a non-building trades union outside the scheme of provincial bargaining.

26. We find it also appropriate to note that there is a distinct difference between the representational rights which flow from the certification (or voluntary recognition) of a trade union within the parameters of the province-wide scheme of bargaining and the designation orders, and the work jurisdiction claims of a trade union (see, for example, the comments of the Board *In The Matter Of Certain Designations And Certain Employee And Employer Bargaining Agencies* [1980] OLRB Rep. Apr. 497; *Superior Plumbing and Heating Company Limited*, [1986] OLRB Rep. Nov. 1589). We agree with the submissions of the Insulators that the work jurisdiction claims and the representational rights of a particular trade union are not co-extensive and should not be treated as synonymous. Moreover, we note that the Act contains detailed provisions designed to resolve issues arising out of competing jurisdictional work claims (see section 93 of the Act). It is our view that it is inappropriate to resolve or attempt to resolve competing work jurisdiction claims in the context of these proceedings in the face of these specific legislative provisions.

27. With respect to the difference between representational rights and work jurisdiction claims we note that the designation orders summarize a trade or a craft in a very general way with-

out particularizing the jurisdictional claims of that trade or craft. To take an example unrelated to this matter, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (amongst others) both exert work jurisdiction claims over welding and welders. The designation orders of the Minister which relate to these two craft unions, and the certificates as bargaining agents granted by the Board to these two unions, do not however refer explicitly to welders. Rather, in claiming welding work each of these two craft unions rely upon assertions that the performance of the skill or work in question is part of their designated craft. It is important to keep this distinction between representational rights and claims to work jurisdiction in mind especially when addressing the issues as to whether asbestos removers are a trade or craft, or whether asbestos removal is a discrete segment of the construction industry.

28. There does not appear to be any significant dispute amongst the parties that prior to the early 1980's there did not exist a separate classification of employee who was engaged solely or primarily in the removal of asbestos. The health hazards associated with asbestos use had not been fully identified and as a result asbestos removal did not comprise a significant portion of any construction industry contractors' work. With an increased recognition of the health hazards of asbestos the number of projects involving asbestos removal has proliferated. In the result the equipment and training required in the removal of asbestos has become more developed since the early 1980's.

29. With this background in mind we turn then to deal specifically with the issues raised by the Minister's referral to the Board.

Asbestos Removal as a Separate Trade

30. First we note that contrary to the Painters' assertions, the material before us falls short of establishing "asbestos removers" as a craft or trade, or "asbestos removal" as a distinct part of the construction industry. Although it is true that certain characteristics of the work of asbestos removal may have become more readily identifiable over the years, the fact remains that asbestos removal is a specific type of work, which, on the material before us, falls within the work jurisdiction claimed by each of the three trade unions. Similarly, although the work of asbestos removal may require certain specific skills, the existence of the various separate collective bargaining regimes referred to by each of the three unions negate any suggestion that a distinct trade or craft of asbestos removal exists.

31. We also do not consider it appropriate to characterize asbestos removal as a discrete segment of the construction industry. It is apparent that the work of asbestos removal can occur as part of a large construction project or as a separate, distinct contract, with respect to mechanical structures or architectural structures, as part of a project to repair existing structures or as new and discrete undertaking, etc. In the circumstances, asbestos removal cannot be considered a discrete, separate segment of the construction industry any more than curb forming can be considered a discrete segment of the roads sector of the construction industry.

32. The fact that asbestos removal is neither a trade nor a discrete part of the construction industry is important when one remembers the purpose of the designation orders and the scheme of province-wide bargaining. If the purpose of the designations is to broadly describe crafts so as to recognize and encourage province-wide single trade bargaining within the ICI sector, it appears to be counter-intuitive to add to such designations a separate specific type of work which may be part of that craft, but which standing alone does not constitute a craft. This is especially true when, as here, there are at least three trade unions each of which asserts that the work function or task is part of its already designated craft or trade. To add specific work functions or tasks to a "craft

based” designation system could cause confusion and a blurring of the distinction between representational rights and work jurisdiction claims.

33. Crafts and trades come and go, are modified and disappear as the construction industry changes and develops. Changes in construction materials and construction methods have caused a certain amount of fluctuation and flexibility in determining the parameters of any crafts’ work functions or skills. That flexibility is and has been advantageous to the constituent members of the construction industry (employers and trade unions alike) as well as the Board. For example, that flexibility initially helps to avoid converting applications for certification into jurisdictional disputes. After certification or voluntary recognition it is that same flexibility upon which the parties will rely to assert or defend grievances and jurisdictional disputes by arguing that a specific type of work is or is not part of the craft, or the work jurisdiction of the trade, and is or is not covered by the collective agreement. To add to the existing structure of designations based on craft a specific work function or specific task would in our view diminish this existing flexibility.

34. Moreover, as construction technology and methods change and evolve, and as construction work opportunities change as a result of these variations, the designated employee bargaining agencies and affiliated bargaining agents could seek to have the current designations varied, modified, revoked and re-designated to reflect that a particular type of work is or should be part of that union’s designated craft. Applications to the Minister for changes to the designation order of this sort do not only reduce the flexibility inherent in the current broadly defined craft based designation system, but may also undermine the certainty and stability of that system as unions would inevitably attempt to ensure that they are not “left out” when specific tasks or types of work are designated.

35. In some ways, the issues currently before the Board epitomize these problems. In this application the Painters assert that the work of asbestos removal is already part of their designated craft (pursuant to the fire-proofing applicator designation). Yet the Painters are not content to rely upon that assertion but seek to specifically add the work of asbestos removal to “reflect the existing bargaining realities”, “to avoid confusion”, and to avoid “jeopardizing the substantial existing bargaining rights of the painters ...”. The Painters’ application has prompted *inter alia* the Labourers to dispute that asbestos removal is already part of the Painters’ designation and to challenge the bargaining rights of the Painters (see below). It has also led both the Labourers and the Insulators to argue that the work they perform also includes asbestos removal and should be similarly reflected in amended designation orders relating to their craft.

36. The Board can readily foresee various applications to amend the designations by different designated bargaining agencies as trade unions seek to enhance or codify their claims to certain types of work, or seek to entrench or buttress their rights to represent certain types of employees. The resulting controversy which would undoubtedly be caused amongst the construction trade unions would do nothing to further harmonious labour relations in this industry and could harm the effectiveness of the existing scheme of province-wide bargaining in the ICI sector.

Existing Bargaining Rights and the Status Quo

37. The current designations already contain certain exceptions to the single trade or craft bargaining scheme. However, the addition of the words “and employees engaged in the removal of asbestos” to any of the designations would not fall within the rationale which led to those initial exceptions. Generally, those instances where the designations currently refer to a particular classification or a particular trade (or part of a trade) which one would not normally consider to be part of that designated EBA’s trade or craft, arose as a result of a trade union’s *pre-existing* practice of representing that particular classification or particular trade (or part of a trade).

38. The addition of “and employees engaged in the removal of asbestos” would not be a recognition of any pre-existing practice of representing employees engaged in that work. The work of asbestos removal and the *de facto* establishment of a separate classification of asbestos remover has taken place primarily after the initial designation orders. Although the purpose of the original, initial designation orders was to preserve the status quo in respect of existing bargaining rights, the addition of a new classification of work to these existing designations would not be a preservation of that status quo. Indeed, such an addition could be seen as a change to the status quo.

39. Any change to that status quo carries with it a number of potential problems. The current exceptions in the designation orders which arose as the result of a recognition of pre-existing bargaining rights have not, to date, resulted in any serious disruption to the scheme of province-wide bargaining. As noted in *Lumber and Sawmill Workers Union, Local 2693, supra*, at paragraph 28:

As noted above, there do exist a number of employee classifications and trades of which more than one employee bargaining agency has been designed. To date this situation has not resulted in any serious disruption to the scheme of provincial bargaining. This appears to be due to several factors, including the relatively small total number of employees in certain classifications, and, in other situations, the limited number of employees negotiated for by one of the bargaining agencies. *Perhaps of greater importance, however, is a general acceptance of the status quo on the part of the unions involved.* Unlike these other situations, if the carpenters and labourers unions are provided with an opportunity to become more active rivals than they are already, there is a real possibility they will avail themselves of the opportunity. ...

(emphasis added)

40. Similarly, it is our view that if the designations of any or all of the Painters, Insulators or Labourers were to be amended by the addition of the words “and employees engaged in the removal of asbestos” to their designations there is a greater opportunity to either develop or continue rivalries which may flow from assertions about representational rights and duties as a result of the designations. Thus, the trade union whose designation includes these words will be in a position to assert that only it can represent employees engaged in the removal of asbestos in the ICI sector. In light of the undisputed fact that at present each of the three trade unions asserts that it has bargaining rights and represents employees engaged in the removal of asbestos, to provide only one of such trade unions with the added “clout” that it has been designated to represent such employees by the Minister could cause the very disruption within the construction industry and to the scheme of province-wide bargaining which Bill 22 was designed to eliminate.

41. As has already been noted a change to the status quo applicable to any one of these three trade unions could be perceived as a precedent and an invitation to other trade unions to make similar amendment requests to the Minister. Prior to 1978 the trend was to consolidate bargaining situations. Bill 22 contributed to that trend by balancing and reconciling a number of competing interests. The resulting consolidation and rationalization of bargaining rights and collective bargaining structures through the system of ministerial designation and province-wide bargaining in the ICI sector was and remains a compromise, not only between employers and trade unions but also amongst the construction trade unions. To intervene in that compromise on the basis of events and circumstances which have occurred primarily since 1978 might cause other trade unions to argue that the compromises of 1978 should be re-evaluated or re-examined as a result of the events of the past 15 years.

42. There are certain additional considerations which apply if each of the three designations were to be amended to include “and employees engaged in the removal of asbestos”. These considerations were referred to in *Lumber and Sawmill Workers Union Local 2693* at paragraph 27:

Another consideration is the instability that can result when rival trade unions represent the same employee classification or trade. Competition between unions can seriously impact on the collective bargaining process. Depending on the state of the economy and employment levels, competing unions may seek to attract employee support by outdoing each other in the negotiation of wages and benefits. Alternatively, one union may seek to negotiate lower wage rates and benefits than the other so as to enable the employers with which it has bargaining relationships to be more competitive. Conduct of this sort is of particular concern in the ICI sector, given that provincial bargaining was introduced so as to bring greater stability to this sector of the construction industry.

43. *In The Matter Of Certain Designations And Certain Employee and Employer Bargaining Agencies* supra the Board in dealing with the somewhat analogous situation of separate designations where two trade unions had merged addressed similar concerns when it referred to the submissions of one of the parties and stated at paragraph 23:

The OGCA raised the spectre of jurisdictional disputes if two sets of designations were created and argued that the positive effects of the affiliation would be in large part nullified. The possibility of restraint of trade was referred to as arising if two sets of designations were created and it was argued that all employers which performed the work in question should be competing on the same labour cost basis. The OGCA predicted that separate collective agreements would inevitably lead to one group of employers securing more favourable conditions than another group. The OGCA stressed that to create two sets of designations would be a dangerous precedent and would invite similar requests from other groups within the bargaining framework of the United Brotherhood, the Labourers' International union of North America and other comprehensive designations.

44. We agree with these observations. A review of all of the material filed by each of the three unions indicates these potential problems are neither hypothetical nor academic. On the basis of the material before us the intra-trade rivalry and whip sawing already exists. Both the Labourers and the Insulators have submitted that they have negotiated special provisions in their collective agreements as a direct response to the actions of the Painters. For example the Labourers submit that:

Until the 1990-92 round of collective bargaining, the Labourers' collective agreements did not distinguish asbestos removal from other demolition work or provide special terms and conditions of employment for persons engaged in asbestos removal. ...

The appearance in the Labourers' collective agreement of special terms for asbestos removal in the demolition industry is not a recognition of the distinctiveness of a segment of the industry; but rather a necessary response to the lower wage packages for the work negotiated by the Painters' union in the 1980's.

45. Although both the Labourers and the Insulators take the position that the Painters have acquired rights with respect to asbestos removers through "under-bidding", in times of economic boom the potential for leap-frogging is equally great and equally disruptive of the scheme of province-wide bargaining. This increased potential for intra-trade rivalries if each of the designations of the unions was amended is in our view a significant reason why the amendments should not be granted.

The Concerns of Overlapping Classifications

46. If each of the three designations were to be amended there would be an obvious and specific overlap in the employee classifications covered by the designation orders. Generally it is an overlap in the ministerial designations (or as is more usual an overlap in employee classifications in collective agreements as a result of competing claims with respect to work jurisdiction) which give rise to jurisdictional disputes and other conflicts within the construction industry. If one accepts

that the overlap already exists because either by implication or interpretation, the current designations of the Painters, Insulators and Labourers already cover “asbestos removers” the amendment request and the resulting overlap is less problematic. Then the addition of the words “and employees engaged in the removal of asbestos” would be largely superfluous. However, if the current designations do not give rise to this overlap it makes no labour relations sense to *create* the overlap and increase the potential for jurisdictional disputes and other conflicts by an amendment to all three designations.

47. This leads us to the significant difference as between the positions of the Painters and the Labourers.

48. The Painters have submitted:

... that “asbestos removal” is included in the phrase in the Painters designation “fireproofing applicators”, but seek, either by confirmation of this from the Board, or by designation amendment as requested, to ensure that ICI bargaining rights may be exercised without challenge arising out of any alleged short comings in the designation.

49. The Labourers however have taken the position that the reference to “fireproofing applicators” does not include asbestos removal and therefore (in accordance with the statutory scheme) the Painters’ can’t presently represent employees engaged in asbestos removal (see paragraph 11 herein). That response in turn caused the Painters to note that the Labourers’ designation also does not refer specifically to either fireproofing or asbestos removal. The Painters however do not go so far as to challenge the right of the Labourers to represent employees engaged in asbestos removal.

50. On the basis of the material filed by the parties and the circumstances which preceded the Painters’ request to the Minister (such as the new 1990-92 collective agreement provisions negotiated by the Labourers with respect to asbestos workers) it may be inferred that this dispute is at least one of the underlying reasons for the Painters’ application. Certainly it is the position of the Painters that they seek merely to preserve the status quo with respect to ICI bargaining rights which that union has acquired and exercised over the past 15 plus years without challenge by either the Labourers or the Insulators. The Painters note that:

The amendment is requested so as to avoid challenges in enforcement of collective agreements, in organizing or otherwise, that the designation does not specifically refer to asbestos removal, and therefore does not include asbestos removal.

51. We are not persuaded however that this is a compelling rationale to support an amendment to any or all of the designations of these three trade unions *when balanced against the potential adverse effects of such amendments*.

52. If the Painters already represent asbestos removal by reason of their designation with respect to “fireproof applicators” there is no need to amend the designation. Although such an amendment would be specific and certain, it would also be largely redundant.

53. If the current designation of the Painters does not permit that union to represent asbestos removers, it should not be amended (at least not in isolation) when it is admitted that both the Labourers and the Insulators have also acquired and exercised bargaining rights for employees engaged in asbestos removal. The amendment of all three designations on the other hand would create the very overlap in bargaining structures and the problems associated with such an overlap which the concept of single trade bargaining in the ICI sector sought to overcome.

III

54. In the result, pursuant to section 141(4) of the Act the Board will report its decision to the Minister in response to the three questions posed as follows:

- (a) No. The proposed addition of the words “and employees engaged in the removal of asbestos” is not *necessary* to permit the Painters’ union to represent asbestos removers to the extent that the union otherwise has jurisdiction over asbestos removal work.” The Painters’ union already asserts jurisdiction over asbestos removal work by reason of its designation with respect to fireproof applicators. In any proceeding to acquire rights to represent asbestos removers the Painters need not be specifically or explicitly designated to represent asbestos removers. It can assert that such work (although not expressly designated) is part of the trade or craft for which it has been specifically designated.

The Minister has not asked the Board to deal with the question whether asbestos removal is part of the trade or craft for which the Painters have been specifically designated. In its submissions the Painters have requested confirmation or a declaration from the Board that its designation (as well as the designation of the Labourers and the Insulators) is broad enough to include asbestos removal. In this regard we note that although the answer to the first question posed by the Minister does not necessarily require the Board to decide whether certain work is part of the Painters’ designated trade, the unchallenged evidence before us suggests that, by reason of its designation with respect to fireproofing applicators, the Painters have represented asbestos removers as part of the trade for which it has been specifically designated with the apparent acceptance of both the Labourers and the Insulators.

- (b) No. It is not appropriate to amend the Painters’ employee bargaining agency designation by adding the words “and employees engaged in the removal of asbestos” to the description of employees covered by that designation. We are of this view primarily because it is undisputed that the Labourers and the Insulators also represent employees engaged in the removal of asbestos. Moreover, there are no good reasons which compel such an amendment, (and a number of policy considerations which point to the opposite conclusion.)
 - (c) Although we have answered the question in (b) above in the negative, we note that in the event the Minister should determine that the words “and employees engaged in the removal of asbestos” should be added to the designation of the Painters, it is our view that the designation orders of the Labourers and the Insulators should be amended in a similar manner so that the current bargaining rights of these unions are also similarly recognized.
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0144-93-G Ontario Allied Construction Trades Council and Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, and The United Brotherhood of Carpenters and Joiners of America, Applicants v. **Ontario Hydro** and Electrical Power Systems Construction Association, Responding Parties

Construction Industry - Construction Industry Grievance - Union alleging breach of collective agreement's lay-off procedure - Employer claiming that junior employees retained in employment pursuant to employer's obligation under section 54 of the *Workers' Compensation Act* (WCA) and that compliance with WCA relieving it of *prima facie* breach of collective agreement - WCA providing that section 54 not operating to displace collective agreement seniority provision - Board holding that lay-off procedure in collective agreement a seniority provision within meaning of WCA and that section 54 providing no defence for violation of collective agreement - Grievance allowed

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *W. A. Correll* and *H. Kobryn*.

APPEARANCES: *N. L. Jesin, J. Lewis, John Marchildon* and *D. Manson* for the applicant; *John Saunders* and *Marna Shecter* for the responding parties.

DECISION OF THE BOARD; July 27, 1993

1. The title of proceedings is amended to include "The United Brotherhood of Carpenters and Joiners of America" as an applicant, and to identify the responding parties as: "Ontario Hydro and Electrical Power Systems Construction Association".

I

2. This is the referral of a grievance in the construction industry under section 126 of the *Labour Relations Act* (the "Act"). The applicants (the "union") allege that the responding parties (the "employer") breached article 14.1 of the Carpenters Appendix to the master portion of the collective agreement by not following the correct project lay-off procedure. The parties agreed to the following facts set out in the employer's response to the application:

1. On or about May 26, 1992, Mr. Robert Bellows (Bellows) allegedly experienced an injury to his lower back while employed for Ontario Hydro as a construction carpenter. He was absent from work from this date until approximately August 31, 1992, during which time he received benefits from workers' compensation.
2. On or about August 31, 1992, Bellows returned to perform the essential duties of his pre-injury job. See Exhibit "A" for the "Notice of Worker's Fitness to Return to Pre-Injury Work" from the Workers' Compensation Board.
3. On or about September 8, 1992, Mr. Tiziano Borgolotto (Borgolotto) allegedly experienced a sore back while employed by Ontario Hydro as a construction carpenter. He was absent from work from this date until approximately November 9, 1992, during which time he received benefits from workers' compensation.
4. On or about November 9, 1992, Borgolotto returned to perform the essential duties of his pre-injury job. See Exhibit "B" for the "Notice of Worker's Fitness to Return to Pre-Injury Work" from the Workers' Compensation Board.
5. During the past two years, Ontario Hydro has been party to five decisions by Reinstatement Officers appointed pursuant to the *Workers' Compensation Act*: R.B. 21/92; R.B. 26/92; R.B. 65/92; R.B. 25/93 and R.B. 27/93.

6. Decision 21/92 has been appealed to the Workers' Compensation Appeals Tribunal and the outcome of that appeal will influence whether the other four cases are appealed or not.
7. While these cases were decided on slightly different fact situations and under different collective agreement language, a decision was reached by the Respondent that these cases, at a minimum, stood for the proposition that they were unable to lay-off Bellows and Borgolotto until they had completed at least six months of re-employment with the Respondent.
8. Due to the completion of the rehabilitation work on Units One and Two at the Lakeview Thermal Generating Station, the number of carpenters has decreased substantially over the last year to the current six tradespersons.
9. On January 28, 1993, twelve carpenters were notified of their permanent lay-off.
10. The seniority of Bellows and Borgolotto was such that, but for the above conclusion which the Respondent has formed based upon the Reinstatement Officer decisions, these two persons would have been permanently laid off. Instead, grievors M. Adams and T. Hewitt, both of whom had more seniority than Bellows and Borgolotto, were permanently laid off.

3. The parties agreed not to call any evidence and, in the event of a finding of liability, asked the Board to limit its remedy to a declaration that the agreement had been breached. The parties would then seek to resolve any monetary and employment issues arising out of the declaration, with the Board remaining seized to resolve any disagreement.

II

4. Article 14.1 of the Carpenters Appendix states:

ARTICLE 14 - PROJECT LAYOFF PROCEDURE

14.1 The layoff of employees covered by this Appendix shall be governed by the following:

- a) For the purpose of this Article, there shall be three (3) groups of employees:
 - (i) Employees working under a Union Work Permit.
 - (ii) Employees who are nonmembers of the appropriate Local Union.
 - (iii) Employees who are members of the appropriate Local Union.

The Union will be responsible for advising an Employer regarding the group status of individual employees.

b) During a reduction of staff, layoff will commence with category (i) and progress through categories (ii) and (iii) respectively.

In established cases of compensable accident, or long term sickness*, an employee will be maintained on the employer's payroll until fit to return to normal duties or until his normal date of layoff, whichever occurs first.

*A long term sickness is that which is 30 calendar days or more in duration. In order to remain eligible, an employee on long term sickness will provide the employer with medical evidence before this period has expired and for every subsequent 30 day period indicating the expected date of return to work.

REV (c) Within category (iii) layoff will be carried out on a project seniority basis for employees

having 3 months or more project service providing the remaining employees can perform the work yet to be completed.

For the purpose of this Article, project seniority shall be defined as the length of continuous service at the project in the bargaining unit classifications covered by this Appendix only.

5. The parties agreed that there were no employees falling within the provisions of Article 14.1(a)(i) and (ii) on January 28th and that Article 14.1(a)(iii) is the only relevant provision, thus bringing into play Article 14.1(c). For purposes of this latter provision, the parties also agreed that all employees in issue had “3 months or more project service” and that “the remaining employees [could] perform the work yet to be completed”.

6. Further, the employer agreed that *but for* its understanding of the requirements of the *Workers' Compensation Act* (the “WCA”), as translated by the reinstatement officer decisions listed in paragraph 2 above, Messrs. Bellows and Borgolotto would have been laid off on January 28th, 1993. The employer admitted, therefore, that the retention of Messrs. Bellows and Borgolotto in employment after January 28th was in breach of Article 14 unless a defence could be found within the requirements of the WCA. The only issues before the Board, therefore, were whether the WCA required the employer to retain Messrs. Bellows and Borgolotto in employment after January 28th and, if so, whether this requirement relieves the employer of a *prima facie* breach of the collective agreement.

III

7. The *Labour Relations Act* has recently been amended to grant collective agreement arbitrators, including the Board when sitting as an arbitrator under section 126 of the Act, the express authority “to interpret and apply the requirements of human rights and other employment related statutes, despite any conflict between these requirements and the terms of the collective agreement”: section 45(8). Thus, assuming that the WCA is an employment related statute, the employer submitted that if its requirements differ from those of the collective agreement, the Board would be empowered to interpret and apply them. This, the employer appeared to assume, would mean that the statutory provisions would take precedence over the contractual ones and either provide a complete defence to an alleged breach of the agreement or relieve against its consequences. On the view we take of the matter, however, this is an issue that need not be resolved.

8. The parties directed our attention to the following provisions of section 54 of the WCA:

OBLIGATION TO RE-EMPLOY

54.-(1) The employer of a worker who as a result of an injury has been unable to work and who, on the date of the injury, had been employed continuously for at least one year by the employer shall offer to re-employ the worker in accordance with this section.

• • •

(4) Upon receiving notice from the Board that a worker is able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to reinstate the worker in the position the worker held on the date of injury or offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date.

• • •

(14) If this section conflicts with a collective agreement that is binding upon the employer and if the obligations of the employer under this section in respect of a worker afford the worker greater re-employment terms in the circumstances than the terms available to the worker under the collective agreement, this section prevails over the collective agreement.

(15) Subsection (14) does not operate to displace the seniority provisions of a collective agreement.

As we understand it, Messrs. Bellows and Borgolotto were reinstated in employment in compliance with subsections (1) and (4) and were retained in employment after January 28th in accordance with subsection (14) and the employer's view of the reinstatement officer decisions referred to in paragraph 2 above. The difficulty with the employer's approach, however, is that it fails to take account of subsection (15) and certain decisions of the Workers' Compensation Appeals Tribunal (the "WCAT") to which we were also referred.

9. In decision numbers 605/91, 173/92 and 296/92I, in particular, the WCAT appears to have taken the position that, by virtue of subsection 54(15), the statutory reinstatement obligations were not intended to confer upon employees a form of "super-seniority" or to insulate them from normal fluctuations in employment unrelated to their status as injured workers. Indeed, in Decision no. 173/92 the WCAT addresses one of the issues before this Board *viz.* whether section 54 provides an injured worker with greater rights to continued employment than would have been available through the strict application of a seniority based lay-off regime set out in a collective agreement. The WCAT commented on the objects of section 54 [formerly section 54b] as follows:

The goal of the section, in the view of this Panel, is to ensure that the injured worker who suffers from a compensable injury, is placed in the position, as far as is reasonably possible, that she would have been in had the injury not temporarily removed her from the workplace. The intent does not appear to be one of creating a category of worker who is, by creation of some sort of "super seniority", one who is insulated from the usual contingencies and uncertainties inherent in that workplace. In this respect, the Panel agrees with much of the reasoning found in Appeals Tribunal *Decision No. 605/91* (p. 9).

10. With respect to subsections (14) and (15), the WCAT continued:

Particularly in cases where the injured worker is a member of a bargaining unit, one limitation upon her protection is clear. Subsections 14 and 15 of section 54b of the Workers' Compensation Act specifically provide that the seniority provisions of a collective agreement are not to be displaced by the provisions of section 54b.

Both parties to this appeal agree that the purpose of subsection (14) and (15) of section 54b is to ensure that the seniority protections of the collective agreement are not diminished by the Workers' Compensation Act. The statutory obligation to re-employ may not be implemented in such a way as to displace those seniority provisions.

The parties also agree that there was no intent on the part of the Legislature to create, for injured bargaining unit members, a status of "super seniority", which provides them with greater seniority over co-workers in the bargaining unit who were not injured. Subsection (15) makes that intent clear. (pp. 9-12)

Applying that analysis to the economic lay-off of an injured worker who had earlier been reinstated in accordance with subsection 54(4), the WCAT concluded:

(d) *The worker's lay off: January 25, 1991*

Finally, the Panel must consider the implications of the January 25, 1991, lay-off. At this point in time, the evidence reveals that a labour surplus was again declared, and the worker was bumped out of her position by a worker with greater seniority. Having exhausted her seniority rights at this point, the worker was laid off. She applied for and received unemployment insurance benefits.

Again, in the view of this Panel, the fact that the worker was laid off in January of 1991, is an

event which occurred as the result of the application of the seniority provisions of the collective agreement to the situation of a labour surplus. There is no aspect of this lay-off which was relevant to considerations pertaining to the compensable accident or any continuing disability.

It is our view that the intent of the Workers' Compensation Act reinstatement provisions is to insure that the worker is returned, as far as is reasonably possible, to the position she would have been in, had the accident not taken place. We are satisfied that that goal was met. In this case, it was not the worker's accident and disability, but the usual contingencies of the workplace, and the effect of the collective agreement seniority provisions, which resulted in the worker's demotions and lay-off. (p. 18)

11. The Board agrees with the WCAT's approach to section 54(15) and sees nothing in the decisions of the reinstatement officers to which we were referred that would lead to a different result. While it would certainly be open to the Legislature to place the status of injured workers ahead of seniority based lay-off and recall regimes, this would undo much of what has been achieved by the labour movement in the last fifty years. The principle of seniority in matters as fundamental as the right to continued employment is now so firmly entrenched in the law and lore of collective bargaining in this province as to require both compelling policy reasons and a clear expression of legislative intent to overcome it. Neither, and indeed the opposite, appear to be present in section 54 of the WCA.

12. On the question of whether Article 14.1 is a "seniority provision" within the meaning of section 54(15), we are of the view that this is an issue that needs to be resolved on the facts of each case. In some cases, Article 14.1(b) may apply. This article provides for lay-off, in the first instance at least, of employees in accordance with their status as (i) working under a Union Permit or (ii) a non-member in the appropriate Local Union. Employees falling within either of these categories may have greater project seniority than members of the appropriate Local Union i.e. category (iii), but would still be required to be laid off first. Had Messrs. Bellows and Borgolotto, for example, been members of either categories (i) or (ii) but possessed of greater project seniority than those in category (iii), their lay-off in accordance with Article 14.1 might not be protected by section 54(15). However, this is not the present case and we see no reason why this possibility should affect the characterization to be given to the operative provision, Article 14.1(c). Similarly, in our view, the fact that Article 14.1(c) is a mixed seniority and ability clause should not alter the result where, as here, ability is not in issue.

13. What we are left with then is a provision which, on the facts of this case, would determine the individuals to be laid off strictly in accordance with seniority. In this respect, the provision appears to be no different from that which was found by the WCAT to be a "seniority provision" in Decision no. 173/92. On the basis of the foregoing analysis, and in light of the apparent purpose of section 54 generally and section 54(15) in particular, we have no difficulty in concluding on the facts of the present case that Article 14.1(c) is a "seniority provision" within the meaning of section 54(15).

14. Accordingly, and having regard to the employer's admissions, the Board declares that the responding parties breached the collective agreement on January 28, 1993 by retaining Messrs. Bellows and Borgolotto in employment while laying off more senior employees. The matter is remitted to the parties to fashion a remedy, failing which the Board remains seized to resolve any disputes.

2924-91-G; 2925-91-G; 0735-93-G; 0736-93-G; 0737-93-R; 3113-92-G; 3785-92-R International Union of Operating Engineers, Local 793, Applicant v. **Ontario Paving Construction Limited**, Responding Party; International Union of Operating Engineers, Local 793, Applicant v. Ontario Paving Company Limited, Responding Party; International Union of Operating Engineers Local 793, Applicant v. Giuseppe Alfano and Sons Ltd., Responding Party; International Union of Operating Engineers Local 793, Applicant v. Pavex Canada Ltd. and Abco Holdings Inc., Responding Parties; International Union of Operating Engineers, Local 793, Applicant v. Giuseppe Alfano & Sons Ltd. and Pavex Canada Ltd. and Abco Holdings Inc. and Ontario Paving Company Limited and Ontario Paving Inc., Responding Parties v. Metropolitan Toronto Sewer and Watermain Contractors Association, Intervenor; Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, Applicant v. Ontario Paving Company Limited, Responding Party; Teamsters Union Local 230, Ready Mix, Building Supplies, Hydro and Construction Drivers, Warehousemen and Helpers, Applicant v. Ontario Paving Company Limited and Ontario Paving Inc., Responding Parties

Adjournment - Construction Industry - Construction Industry Grievance - Practice and Procedure - Board granting adjournment request made by first responding employer but scheduling continuation dates peremptory to all responding parties - First responding employer directed to reimburse applicants for their share of section 126(4) expenses incurred with respect to adjourned hearing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *N. L. Jesin*, *J. Burt* and *F. Maranno* for Teamsters Local 230; *N. L. Jesin* and *Carol Oster* for Operating Engineers, Local 793; *Carmine Alfano* for Ontario Paving Construction Limited, Ontario Paving Company Limited, Giuseppe Alfano and Sons Ltd., Pavex Canada Ltd., and Abco Holdings Inc.; no one appeared at the hearing on behalf of Ontario Paving Inc.

DECISION OF THE BOARD; July 13, 1993

1. These matters came on for hearing on July 13, 1993. At 6:56 a.m. on July 13, 1993, a fax was sent to the Board (and is stamped received at 8:44 a.m.) by Joseph Alfano as follows:

"With reference to the above, I attach a doctor's note with reference to Joseph Alfano. As such, he is unable to attend the hearing with reference to the above, and would kindly ask that it be adjourned, as per his doctor's note.

Thank you."

The "Doctor's note" referred to reads as follows:

Dr. Evelyn Doobay
2100 Finch Avenue West, Suite 209, Downsview, Ontario, M3N 1N2 665-8086 [sic]

DISABILITY CERTIFICATE

Date July 12/93NAME J. Alfano

ADDRESS _____

EMPLOYER _____

To Whom It May Concern:

This is to certify that the above patient was under my professional care on July 12/93 inclusive and was totally incapacitated during this time.

This is to further certify that the above patient may be able to return to light regular work duties on July 19/93

Restrictions: _____

Dr. "Evelyn Doobay"

2. The applicants opposed the adjournment.

3. Subject to the rules of natural justice and fairness, the Board enjoys a Broad discretion to determine whether and in what circumstances proceedings before it should be adjourned (*Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879*, (1979) 24 O.R. (2d) 400 (Ontario Div. Court)). In recognition of the need to proceed with labour relations matters expeditiously, the Board's well established practice is not to grant adjournments except on consent of all parties, or where the Board is satisfied that there are extenuating circumstances such that an adjournment is appropriate. No party is entitled to an adjournment as a matter of convenience.

4. It has long been accepted that the effect of delay in labour relations matters is generally a negative one. To put it another way, labour relations delayed are labour relations defeated and denied (*Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild, Local 205, OLRB et al* [1977] 1 ACWS 817 (Ontario Court of Appeal)), and delay in labour relations matters often works unfairness and hardship (*Re United Headwear and Biltmore-Stetson (Canada) Inc.* (1983) 40 O.R. (2d) 287). Delay in the resolution of any dispute is likely to create prejudice but this is particularly so in labour relations matters. The Board and the Courts have long recognized that the speedy resolution of labour relations disputes is both in the public interest and in the interests of those directly involved. Consequently, labour relations litigation is expected to be pursued diligently and completed within a reasonable time (which time is generally measured in months rather than years) so that the matters in issue can be dealt with in a manner which is timely and fair to all concerned. Indeed, the recent amendments to the *Labour Relations Act* and the changes in the Board's procedures underline both the Legislatures and the Board's sensitivity to the need to resolve labour relations disputes quickly.

5. Neither Joseph Alfano, nor anyone on his behalf or on behalf of Ontario Paving Inc. gave either the applicants or the Board any indication that Ontario Paving Inc. would be requesting an adjournment of the July 13, 1993 hearing prior to the morning of that hearing. Nor did anyone attend before the Board on behalf of Ontario Paving Inc. on the day of the hearing to make the request or to speak to it.

6. This is not the way to make an adjournment request which has not been consented to by all parties. Where a party seeks an adjournment at the last moment and without prior notice to the other parties or the Board, it must ordinarily make that request through a properly informed and instructed representative at the hearing, both as a matter of courtesy and to ensure that the adjournment request is dealt with appropriately. If a party does not send a representative to make such a request, it runs a very real risk that its request for an adjournment may be denied, or that it may be granted on terms or to a date which may cause it some concern.

7. Further, the kind of "fill in the blanks" medical note presented in support of the adjournment request in this case is not very satisfactory. It offers no diagnosis or prognosis. Nor does it otherwise indicate the nature of the disability. Indeed, there is very little in it to inspire confidence in the assessment it purports to reflect.

8. Nevertheless, given the history of these proceedings (which we find it unnecessary to recount herein), the fact that throughout these proceedings Joseph Alfano has represented Ontario Paving Inc., and that the effect of the delay of 6 days to July 19, 1993 is negligible in the context of the history of these proceedings, the Board reluctantly ruled, orally, that the hearing should be adjourned to July 19, 1993, commencing at 9:30 a.m. in the "Board Room", 6th Floor, 400 University Avenue, Toronto, Ontario, and to continue, if necessary, on July 28, 1993.

9. The Board further ruled that the July 13 and 28, 1993 hearing dates are peremptory to all responding parties. Except on consent of the applicants, they will not be adjournable or postponeable by the responding parties for any reason. If Joseph Alfano was unable to attend on behalf of Ontario Paving Inc., Ontario Paving Inc. must insure that a properly informed and instructed representative does so.

10. The applicants asked for their "costs of the day" as a term of any adjournment. Certainly, this adjournment is no fault of the applicants who were ready, willing and able to proceed on July 13, 1993, and they undoubtedly incurred some significant expense in attending the hearing. One of the expenses they have incurred is the one specified by section 126(4) of the *Labour Relations Act*, the amount of which is currently set by Regulation at \$500.00. In granting the adjournment, the Board found it appropriate in the circumstances to direct Ontario Paving Inc. to reimburse the applicants for their share of the section 126(4) expenses incurred with respect to the July 13, 1993 hearing.

11. Further, the applicants submitted that the Board could and should dispose of some or all of the applications herein on the basis of the materials and pleadings presently filed. In that respect, the applicants pointed to the June 24, 1993 decision of the Board (differently constituted) in these proceedings in which the Board directed that the responding parties file "a detailed statement of all material facts on which the responding parties rely" in opposing the applications, prior to the July 13, 1993 hearing. Nothing has been filed by any responding party in that respect.

12. The Board declined to rule on the applicants' request at the July 13, 1993 hearing. However, subject to the representations the parties may wish to make in that respect, the Board may dispose of these applications, or some of them, at the hearing on July 19, 1993 on the basis of the materials and pleadings presently before the Board.

3397-92-U Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Applicant v. Peacock Lumber Ltd., Responding Party

Collective Agreement - Duty to Bargain in Good Faith - Interference with Trade Unions - Final Offer Vote - Unfair Labour Practice - Employer final offer containing duration clause of June 30, 1993 to July 1, 1993 - Final offer vote under section 40 the Act taking place in December 1992 resulting in acceptance by employees - Union refusing to execute offer - Union asking Board to direct extension of duration clause contained in final offer to one year from date of final offer vote and to require execution of collective agreement bearing that term - Union's application dismissed

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

APPEARANCES: *Michael Wright*, *Robert McKay* and *Jim Pound* for the applicant; no one appearing for the responding party.

DECISION OF THE BOARD; July 28, 1993

1. This is an application by the Retail, Wholesale and Department Store Union AFL-CIO-CLC under section 91 of the *Labour Relations Act* alleging a breach of sections 15, 53(1) and 65 of the Act by the responding party Peacock Lumber Ltd. A hearing was held in this matter on May 19, 1993, at the conclusion of which the application was dismissed for reasons to follow. These are the Board's reasons.

I

2. The most recent collective agreement between the parties expired on July 1, 1992. The union gave notice to bargain in a timely way and, subsequently, proposed a collective agreement with a two year duration clause. In November 1992 the employer rejected this offer and tabled a counter-offer which contained, among other things, a duration clause of June 30, 1992 to July 1, 1993. Significantly for the purposes of this decision, the latter date was less than 12 months from the date the offer was made. The union rejected this offer and, in December 1992, a final offer vote was requested by the employer under section 40 of the Act. Voting took place on December 23, 1992 and resulted in the acceptance of the employer's offer by the employees. Since then, however, the union has refused to execute the offer.

3. The evidence also establishes that an application for decertification was dismissed in the summer of 1992 following a tie in the balloting.

4. On the basis of these facts, and in light of the requirements of section 53(1) of the Act, the union asked the Board to direct an extension of the duration clause contained in the employer's final offer to one year from the date of the final offer vote, i.e. to December 22, 1993, and to require the execution of a collective agreement bearing that term.

5. The employer failed to attend at the hearing, but filed a response which took issue with a number of the allegations set out in the application and raised a number of preliminary objections including the absence of a *prima facie* case, estoppel and waiver. The response concludes with a request that the application be dismissed and, among other things, that the union be directed to execute the employer's final offer with the existing duration clause.

II

6. The union submits that pursuant to section 53(1) of the Act, collective agreements must operate for a minimum period of one year *from the date of execution* unless the employer *and the union* agree to include a period of retroactivity in the operation of the agreement. Without its involvement and explicit agreement, the union submits, collective agreements cannot operate retroactively and use the retroactive period to reach the minimum one year term. In the present case, according to the union, there was no such involvement and agreement because the employer's final offer was accepted by the employees, not by the union. Section 53(1) of the Act states:

53.-(1) If a collective agreement does not provide for its term of operation or provides for its operation for an unspecified term or for a term of less than one year it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

7. Underlying the union's submission is the concern that acceptance by employees of a final offer which contains a period of retroactivity in the calculation of a one year duration clause may deprive the union of the opportunity to address the consequences of the retroactive period in bargaining with the employer. This may create difficulties in enforcing any rights that may arise in respect of the period during which no agreement was actually in place. Counsel for the union candidly admitted, however, that no such difficulties would appear to arise in the present case because the employer's final offer provides for a "wage freeze". According to counsel, what the union was really looking for, and what it is properly entitled to under section 53(1), was some "breathing space" during which it could re-establish itself in the eyes of the employees following the application for decertification.

8. The difficulty with the union's case, however, is that it focused solely on section 53(1), to the exclusion of any other provision of the Act. No reference was made in argument to section 15 and to a possible breach of the duty to bargain in good faith. Other than what has been described above, no evidence was called as to the collective agreement negotiations between the parties or the state they were in at the time the vote was requested. It was not submitted, for example, that an employer request for a vote on a final offer which will run for less than one year from the date of its acceptance by employees, or its execution by the union, was itself evidence of a breach of section 15. There was no attempt made, for example, to link an employer request for a duration clause which allegedly fails to meet the minimum requirements of section 53(1) with taking to impasse a demand in bargaining for an amended scope clause. While it may be that a request for a final offer vote is, itself, evidence of impasse, this argument was not made. Further, even assuming that section 53(1) is a provision which is capable of being breached and giving rise to a remedy, a proposition which was not expressly argued, it could not apply at present. As the Board's decision in *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583 makes clear, final offer votes are not self-executing; there is no collective agreement to which section 53(1) might apply until the offer is signed by the trade union.

9. For all of these reasons, the application was dismissed. In reaching this result, however, the Board wishes to note that its decision does not affect the rights of any party to raise in any future proceedings before the Board the issue of the operative date, for purposes of section 53(1), of an executed final offer.

3239-92-M United Food and Commercial Workers International Union, Local 175, Applicant v. Price Club Canada Inc., Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Union filing complaint in respect of alleged unlawful discharge in August 1992 - Union applying for interim order reinstating discharged employee in February 1993 - In all the circumstances, including the elapsed time between the discharge and the coming into force of section 92.1 and including the applicant's one month delay in filing union's application, Board not satisfied that balance of harm favouring the applicant - Application dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

APPEARANCES: *Douglas J. Wray*, *Richard Wauhkonen*, *Vince Gentile* and *Ken Darnell* for the applicant; *C. E. Humphrey*, *M. Sherrand* and *Gail Warnica* for the responding party.

DECISION OF ROBERT D. HOWE, VICE-CHAIR AND BOARD MEMBER R. W. PIRRIE; July 16, 1993

1. This is an application for an interim order under section 92.1 of the *Labour Relations Act*, which provides as follows:

On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

2. In a decision dated March 2, 1993, a majority of this panel ruled as follows:

For reasons which will issue at a later date, the majority of this panel, with Board Member Davies reserving her decision on the matter, hereby dismisses this application for an interim order under section 92.1 of the *Labour Relations Act*.

These are the reasons for that decision.

3. This application relates to Board File Nos. 1467-92-U, 1535-92-R, 1602-92-R, and 1615-92-U. The first of those four files is a complaint under section 91 [formerly section 89] of the Act in which the applicant (also referred to in this decision as the "Union") alleges that the responding party (also referred to as the "Company") terminated the employment of Kenneth Darnell because of his support for the Union. That complaint was filed with the Board on August 19, 1992. File Nos. 1535-92-R and 1602-92-R are certification applications filed by the Union on August 26, 1992, and September 4, 1992, respectively, in relation to full-time and part-time employees at the Company's Westminster (London) store. File No. 1615-92-U is a further section 91 complaint (filed on September 8, 1992) in which the Union alleges a number of other unfair labour practices on the part of the Company (which is said to have contravened sections 3, 65, 67, 71, 81, and 82 of the Act).

4. In an unreported decision dated November 5, 1992, another panel of the Board chaired by the Vice-Chair of this panel wrote, in part, as follows regarding those four files:

...

2. After hearing submissions on some of the issues in dispute in respect of the certification applications, the Board, in a decision dated October 15, 1992, determined an appropriate bargaining unit for each of the applications and resolved all of the challenges to the respondent's lists

except the Union's requested addition of Ken Darnell. Mr. Darnell's status was described as follows in paragraph 15 of that decision:

... As regards the applicant's requested addition of Ken Darnell, who was discharged by the respondent prior to the filing of that application, it is common ground among the parties that if the Union's section 91 complaint (File No. 1467-92-U) regarding Mr. Darnell's discharge results in his reinstatement, his name would be added to the list. Thus, the resolution of that requested addition must await the disposition of that complaint....

3. At the October 21, 1992 continuation of hearing, the count for the full-time bargaining unit was corrected from 55 out of 101 employees to 55 out of 100 employees. Accordingly, paragraph 16 of the Board's decision dated October 15, 1992 is revoked and the following is substituted for that paragraph:

16. In respect of bargaining unit #1, the applicant has filed membership evidence for 55 out of the 100 employees currently included on the respondent's list for purposes of the count (i.e., not more than 55%). If the Union's aforementioned section 91 complaint results in Mr. Darnell's reinstatement, the count will become 56 out of 101 employees (i.e., more than 55%) and the petitions filed by the objectors will become numerically relevant to the issue of whether a representation vote should be taken, since four of the employees in bargaining unit #1 who signed membership cards also signed a petition. However, the counter-petitions filed by the Union will remain numerically irrelevant as only two of those four employees signed a counter-petition.

....

6. Since this panel of the Board is not seized of these matters and another panel has substantially earlier hearing dates available, these four files have been listed for hearing before another panel of the Board on the following dates (to which the parties agreed on October 21, 1992): February 11, 15, and 17, March 1 and 2, April 1, 2, 6, 7, 8, 20, 21, 27, and 28, 1993.

....

5. The Union has filed cards for less than forty-five per cent of the Company's part-time employees, and seeks to be certified as their bargaining agent under the following provision, which was section 8 of the Act prior to the Bill 40 (S.O. 1992, c.21) amendments:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Bill 40 repealed that provision and substituted section 9.2, which provides:

If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Section 8 is also relied upon by the Union as an alternative means of obtaining certification for the full-time unit.

6. In this interim order application which was filed on February 8, 1993, the Union requested an interim order reinstating Mr. Darnell into his former position with the responding

party. (It also requested interim compensation for Mr. Darnell, but that request was not pressed by the Union at the hearing of this application.)

7. In support of this application, the Union filed two declarations, one by Mr. Darnell and the other by Richard Wauhkonen, an organiser for the Union. The material portions of Mr. Darnell's declaration may be summarised as follows. Mr. Darnell commenced employment at the Company's Westminster Store in October of 1990 as a "maintenance man". After becoming aware in April of 1992 that the Union was attempting to organise the Company's employees, he signed a Union membership card on June 9, 1992, and became an active supporter of the organizing drive. From June to August of 1992, Mr. Darnell spoke with numerous co-workers, advocating the benefits of a union in the workplace and directing them to one of the Union's key inside organizers. During July various members of management saw him talking to other Union supporters. On August 10, he posted in the Company's lunchroom a newspaper article regarding a Union contract settlement. On the following day he posted another article regarding pay equity. Shortly after this he was called into the Store Manager's office and informed that his employment was being terminated for stealing cigarettes. Mr. Darnell denies that he stole cigarettes or anything else from the responding party, and expresses the view that he was terminated because of his affiliation with the Union. He is married and lives with his wife and two children, aged ten and twelve. His wife does not work outside of the home, and he is the sole provider for his family. Since the time of his termination, he has been unable to find employment. He has been receiving Unemployment Insurance Benefits which, at the time he signed the declaration on February 5, 1993, were to be terminated in the near future. As a result of his termination, Mr. Darnell and his family have been forced to severely reduce their expenditures. He and his wife are no longer able to pay their monthly utility bills, and their children are no longer able to join their classmates on school outings.

8. Much of the material contained in Mr. Wauhkonen's declaration essentially reiterates the allegations contained in the Union's unfair labour practice complaints, and is not based upon his "first-hand knowledge", as required by Rule 86(a) of the Board's Rules of Procedure. It is unnecessary to detail those allegations or to determine what weight, if any, should generally be given to hearsay material contained in declarations filed with the Board in support of an application for an interim order under section 92.1 of the Act. It suffices for purposes of this decision to merely note that if those allegations are true, Mr. Darnell will in all probability be entitled to be reinstated with compensation for lost wages and benefits, and the Union will very likely be certified without a representation vote.

9. Thus, assuming that all of the facts relied upon by the applicant are true, the Board is satisfied that an arguable case has been made out for a number of the orders sought in the proceedings to which this application relates, including Mr. Darnell's reinstatement. We turn then to the more difficult matter of weighing the labour relations harm which could result from granting or not granting the interim reinstatement of Mr. Darnell sought by the application in the instant case.

10. Paragraph 6 of Schedule "A" to the (Form A-40) application indicates that the applicant "relies on the harm alluded to in the Declarations of Mr. Darnell and Richard Wauhkonen as its reasons in support of this Application." In addition to the aforementioned harm which the termination has caused to Mr. Darnell and his family, those declarations indicate that the termination of Mr. Darnell has harmed the Union by creating a chilling effect on its organizing drive. In his declaration, Mr. Darnell expresses the belief that his termination "has caused the Union great prejudice in signing up members", as it "has frightened other employees from joining the Union or even talking about it for fear they may also be terminated." Mr. Wauhkonen asserts in his declaration that "Mr. Darnell's termination has caused much unrest amongst the Respondent's employees

and has created a chilling effect on the Union's campaign." He also expresses a belief "that the Union will suffer further prejudice if an interim order reinstating Mr. Darnell is not granted and the harm already done not mitigated as far as possible."

11. In his able submissions on behalf of the Union, Mr. Wray also submitted that if interim reinstatement is not granted, the discharge could have a chilling effect on any attempts by the Union to organize the office and clerical workers who are excluded from the bargaining units, could undermine existing support for the Union, and could have an adverse effect on a representation vote.

12. The Company filed with its response a declaration by Gail Warnica, who is the Company's Director of Human Resources, Ontario Region. That declaration reads as part in follows:

• • • •

3. Kenneth Darnell's employment with the company was terminated on August 11, 1992. The sole reason for the termination of Mr. Darnell's employment was the company's conclusion that he had been involved in the theft of cigarettes from the company on August 10, 1992.

4. The company in coming to the conclusion that Mr. Darnell had stolen cigarettes from the company relied on a videotape which shows Mr. Darnell in the act of stealing cigarettes. The behaviour exhibited by Mr. Darnell in the tape is consistent only with an intention to steal.

5. The company has well-established rules under which theft is cause for discharge.

6. The company has had a consistent, long-standing practice of terminating employees for theft.

7. The termination of Mr. Darnell's employment was consistent with the company's rules and practice regarding termination for theft.

• • • •

9. The termination of Mr. Darnell's employment was in no way related to any union activity in which he is alleged to have been involved.

• • • •

16. Employees of the company are aware of the reason for the termination of Mr. Darnell's employment. If Mr. Darnell were to be reinstated at this time it is my belief that it would be interpreted by employees as an indication that the company's rules cannot be enforced by the company and that theft of company property will not result in termination of employment.

13. Part V of Schedule "A" to the Company's response reads as follows:

V. The Responding Party will Suffer Harm in the event that the Order is Granted

15. The Application for Interim Relief seeks to return to the workplace an employee whose employment has been terminated for very serious misconduct. Given the nature of the Responding Party's business, employee honesty is an important consideration for the Responding Party. Not only would returning Mr. Darnell to the workplace put the Responding Party at risk of a repetition of the conduct that originally lead to his discharge, but would undermine the efforts of the Responding Party to ensure that there is a clear understanding on the part of employees of the consequences of theft. The effects on the employer of a return of Mr. Darnell to the workplace are significant and cannot be compensated for.

16. In the case of Mr. Darnell, in the event that he is reinstated the financial loss that he has suffered can be compensated by an award of damages.

(The first four parts of that schedule detail requests that the application be dismissed on the grounds of non-compliance with Rule 86, unreasonable delay in bringing the application, lack of a sufficiently strong labour relations interest to justify the granting of an interim order, and lack of a *prima facie* case to justify the granting of interim relief.)

14. It is clear from the foregoing that Mr. Darnell and his family have suffered a substantial financial loss as a result of his discharge. To the extent that other employees may have concluded that Mr. Darnell's discharge was based upon his support for the Union, their concern that they too might suffer such loss may well have had a chilling effect on the Union's organizing drive. However, as indicated above, the Union filed its applications for certification on August 26, 1992, and September 4, 1992. Thus, the level of employee support was crystallized for purposes of those applications on the terminal dates in September of 1992 which were assigned to those applications. Nothing which this Board could have granted by way of interim relief in late February or early March of 1993 would have altered any chilling effect which the Company's termination of Mr. Darnell may have had upon the Union's ability to sign the Company's employees into membership in the late summer or early fall of 1992.

15. Section 92.1 came into force on January 1, 1993. This application was not filed with the Board until February 8, 1993. Thus, this application could have been filed approximately a month earlier than it was. Although it is unnecessary to decide whether a delay of that magnitude will generally prompt the Board to dismiss an application for an interim order, we note that such delay lends considerable credence to the responding party's contention that the matter is not sufficiently urgent in nature to warrant the granting of an interim order. While no blame can be attributed to the applicant in respect of the period from August 11, 1992 to January 1, 1993, the fact that interim relief was not available at the time of the discharge and during that ensuing period of four and a half months also militates against the granting of interim relief in the circumstances of this case, in which it was impossible for the Board to intervene in a timely fashion to effectively reverse or substantially mitigate the chilling effects of the discharge.

16. Although the adverse financial situation in which Mr. Darnell and his family have been placed as a result of his termination certainly engenders feelings of sympathy for them, that does not, by itself, warrant the granting an interim order under section 92.1 of the Act. If, as contended by the Union, the Company's discharge of Mr. Darnell contravened the Act, he will be entitled to be reinstated and to be compensated for all lost wages and other benefits, with interest. Although it is doubtful that reinstatement and damages can entirely remedy all of the harm suffered during a period of unemployment resulting from a discharge in contravention of the Act, it is clear that the harm that the applicant seeks to avoid in relation to Mr. Darnell (and his family) is predominantly, if not exclusively, financial in nature. We are not persuaded that it would be appropriate for the Board to grant an interim order in respect of harm of that type in the circumstances of this case.

17. We are not prepared to give any weight to Union counsel's submission that Mr. Darnell's discharge could have a chilling effect on any attempts by the Union to organize the Company's office and clerical workers, because no mention of that potential harm was made in the application, nor in either of the declarations filed by the applicant. As regards the discharge's potential adverse effect on a representation vote, no such vote will be conducted until after the panel charged with hearing the merits of the aforementioned applications and complaints has determined whether or not the Company contravened the Act by discharging Mr. Darnell. If his discharge was violative of the Act, the addition of Mr. Darnell's name to the list will result in the full-time count becoming 56 out of 101 (i.e., more than fifty-five per cent), and in the petitions filed by the objecting employees becoming numerically relevant. If those petitions are found to be voluntary, a representation vote will only be directed if the Board concludes that the true wishes of the

employees would be likely to be ascertained by means of a representation vote despite that discharge and any other contraventions of the Act by the Company. Otherwise, the Board will be in a position to certify the Union without a representation vote. Since the Union has not filed a sufficient number of membership cards to obtain a representation vote in respect of the part-time bargaining unit, its certifiability for that unit will depend upon whether or not certification without a representation vote is available to it under the applicable statutory provision. Thus, in the circumstances of this case, there is relatively little merit in the applicant's contention that if interim reinstatement is not granted, Mr. Darnell's discharge could have an adverse effect on a representation vote.

18. Although the possibility that Mr. Darnell's ongoing unemployment and concomitant financial difficulties may undermine existing support for the Union is a matter of legitimate concern, in the circumstances of this case the possible harm to the applicant if interim reinstatement is not granted is not of greater significance than the possible harm which may result to the responding party if the order sought by the applicant is granted. If, as contended by the responding party, Mr. Darnell was discharged for stealing cigarettes from the Company in contravention of well-established rules under which theft is cause for discharge, his interim reinstatement could not only create a risk of further theft on his part, but could also indicate to other employees that the Company cannot enforce those rules, thereby undermining the Company's efforts to ensure that there is a clear understanding on the part of its employees of the consequences of theft. Such harm, which is particularly significant in the context of the industry in which the Company operates, could not be effectively compensated for or otherwise redressed.

19. For the reasons set forth above, and with particular regard for our assessment of the relative harm which could be suffered by the applicant and the responding party (which, in the circumstances of this case, included considerations relating to the applicant's one month delay in filing the application, and the further period of four and a half months which had elapsed between the date of the discharge and the date on which section 92.1 came into force), we decided not to grant the interim order sought by the applicant, in the exercise of our discretion under section 92.1 of the Act.

DECISION OF BOARD MEMBER KAREN DAVIES; July 16, 1993

1. I have read the decision of the majority and with the greatest respect I dissent. The harm the applicant will suffer from the Board's denial of the interim relief outweighs the harm that the employer will experience if we were to grant the relief.

2. The majority appears to have drawn a "bright line" when determining whether to grant interim relief in an unfair labour practice case like this. It appears to have made the filing of an application for certification the event before and after which the likelihood of the Board granting interim relief is greater and lesser, respectively.

3. I do not believe that a "bright line" ought to be drawn at all in unfair labour practice interim relief cases. However, if one is going to be drawn at all, it should not be at the early point of application for certification. Drawing a line as the majority has done is not only arbitrary, it fails to take into account the fact that there are other important statutory rights that stand apart from the right to be certified, and that these rights can be impaired -- perhaps permanently and irreversibly -- even after the date on which an application for certification has been filed.

4. At a minimum, the majority should have considered the potential harm to the employees and union up to the date of the disposition of the certification application. On this point, sec-

tion 92.2 of the Act should be instructive. That section allows a union to request an expedited hearing on a s.91 complaint alleging that an employee has been disciplined, discharged or otherwise penalized contrary to the Act “during the period beginning with a trade union’s organizing activities and *ending with the disposition of its application for certification.*” (emphasis added) With this section the legislature has, in recognizing the importance of expedition and the detrimental effect of delay in dealing with a union’s allegation of an unfair labour practice during a union’s organizing campaign, signalled its view of the particularly vulnerable period of the organizing campaign as extending up until the disposition of the application for certification, not only up until the date the application is filed.

5. Drawing a “bright line” at the date of application not only ignores the clear signal of the legislature, it also does not take into account the dynamics of employee-employer relations. An employee’s real or perceived economic vulnerability vis-a-vis his or her employer does not end when a certification application is filed. Employer unfair labour practices seriously jeopardize union support and inhibit lawful union activity even in a relatively mature collective bargaining relationship (which this is not). This fact of employee vulnerability has long been recognized by this Board. For example, in *Silknet Limited* ([1983] OLRB Rep August 1362), an unfair labour practice discharge of a union steward occurred well into the collective bargaining relationship. The Board in that case stated:

It goes without saying that the grievor must be immediately reinstated and compensated for all lost wages and benefits together with interest. We so award. However, we do not think that this, in itself, is sufficient, for it does not redress the “chilling effect” on other employees who would be aware of the discharge and understand its origin. The evidence before the Board is that Mr. Islam’s discharge is a matter of some concern to the employees who recently elected him to represent them; moreover, the dismissal of the grievor in the circumstances here conveys a strong warning to other employees which would inevitably dissuade them from engaging in activities which, in fact, are protected by the statute.”

6. Employees who witness the economic, social, psychological and emotional losses that are experienced by an employee who has been discharged because of his or her union activities are likely to be hindered from freely exercising their rights under the Act to support a union and to participate in lawful union activities. This deprivation of the ability to exercise statutory rights is an important harm in and of itself. Moreover, this will impact on the level of support a union receives and can sustain, and this can have negative consequences for the union for its entire tenure at that workplace. In addition, the potential ripple effect an unfair labour practice discharge creates is a harm that should be taken into account. This would recognize that a chilling effect lingers with an employee long after he or she leaves the workplace at which the unfair labour practice was committed. As an employee comes into contact with other employees at new workplaces, his or her negative experiences are sure to impact upon the other employees’ views of the desirability of enforcing their statutory rights.

7. I also disagree with the majority statement that “the harm that the applicant seeks to avoid in relation to Mr. Darnell (and his family) is predominantly, if not exclusively, financial in nature”, and that it is not appropriate for the Board to grant an interim order to prevent that type of harm. Assuming that there is such a category in the labour relations arena as “pure financial harm” for which interim relief should not be made available, this is not it. There is a significant element of non-monetary harm that a discharged employee suffers that is irreparable and that cannot be compensated in an award of damages. Stress, anxiety, indignity, lifestyle adjustments, loss of the social milieu of the workplace, loss of self-esteem, identity or social standing, and the uncertainty of finding another job (*Roytec Vinyl Co.*, [1990] OLRB Rep. June 727) are examples of harms that are not of a financial nature.

8. Each day that Mr. Darnell remains discharged, employees at the company's workplace may be dissuaded from exercising their statutorily protected rights, the union's level of support can be jeopardized, and Mr. Darnell can incur the types of personal harm outlined above. I agree with the Board in *Loeb Highland* ([1993] OLRB Rep. March 197) that the emphasis in interim orders should be on protecting rights rather than relying on a subsequent remedy based on the rights being violated. Based on this, I think any reliance by the majority on the possible availability of a certificate pursuant to a s. 9.2 remedy and/or reinstatement with compensation at the end of the hearing on the merits appear to be misplaced. These remedies will not adequately address the impact of the chilling effect on the support for the union and it can do nothing to retroactively rectify the daily chilling effect on employees' appetite to exercise their rights under the Act, or the non-financial harms Mr. Darnell would have suffered.

9. I would conclude then, that the potential harm of not granting the interim order is significant. This brings me to a consideration of the harm that may result from granting the order.

10. Interim reinstatement of Mr. Darnell would mean that an employee who is suspected of theft would be back in the workplace. I recognize that any theft is of considerable concern to an employer. However, the low rate of recidivism in theft cases should go some length to address the employer's concerns, and in this respect the potential harm to the employer is minimized. (See George Adams' study "Grievance Arbitration of Discharge Cases" (Industrial Relations Centre, Queen's University, 1978) which found that the rate of recidivism for employees who were disciplined for dishonesty was the lowest of all categories studied.) See also the concurring opinion of the management board member in *Loeb Highland*, ([1993] OLRB Rep. April 354) in which the risk of a theft occurring during the period of interim reinstatement was assessed as being minimal.

11. The employer also claimed that interim reinstatement would have a negative effect on the managerial authority of the company, and particularly on its policy with respect to theft. This harm could be minimized by posting a Notice to Employees similar to the one that was utilized in *Tate Andale Canada Inc.* ([1993] OLRB Rep. March 254). It would explain that the reinstatement of Mr. Darnell is on an interim basis only, until the reason for his discharge is determined, and that if ultimately he is found to have been discharged for theft his discharge may be confirmed.

12. In view of the above, I would have granted the relief sought by the applicant and ordered the interim reinstatement of Mr. Darnell.

0940-93-R Service Employees Union, Local 210, Applicant v. Provincial Nursing Home Limited Partnership, Responding Party

Bargaining Unit - Certification - Union applying for certification and proposing bargaining unit excluding registered nurses - Employer proposing that registered nurses be included in unit - Board seeing no reason to depart from its policy with respect to exclusion of registered nurses from all-employee units in nursing homes - Board satisfied that union's proposed unit viable and would not cause serious labour relations problems - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *D. A. MacDonald* and *B. L. Armstrong*.

APPEARANCES: *David Cowling* and *Ed Ozimek* for the responding party; no one appearing on behalf of the applicant.

DECISION OF THE BOARD; July 12, 1993

1. The style of cause is hereby amended to reflect the correct name of the responding party: "Provincial Nursing Home Limited Partnership".

2. This is an application for certification in which the parties, through a Labour Relations Officer, have resolved all issues prior to the hearing, save for the description of the bargaining unit. The unit proposed by the applicant is:

all employees of Provincial Nursing Home Limited Partnership in the Town of Seaforth regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor and registered nurses.

3. The respondent proposes that the Board include the registered nurses in the unit. At the hearing of this matter on July 12, 1993, the applicant did not appear, apparently due to a death in the family of the applicant's representative. The applicant informed the Board of this by fax on the morning of the hearing, and did not request an adjournment. After hearing the evidence and submissions of the responding party, and reviewing the written submissions of the applicant, the Board gave the following oral ruling:

Having carefully considered the evidence and submissions of the responding party and the submissions of the applicant, which were sent to the Board by fax this morning, we are satisfied that the bargaining unit proposed by the applicant is appropriate.

The focus of the Board's determination is whether the unit applied for is *an* appropriate unit, though it may not be the *most* appropriate unit. In *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board posed the question as whether the unit which the union seeks to represent encompasses a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

We are satisfied that in the nursing home sector it is not uncommon for registered nurses ("RN's") to be excluded from all-employee or service units. The responding party acknowledges that the practice is at least mixed. In *West Lincoln Multilevel Health Facility Inc.*, [1988] OLRB Rep. Nov. 1185, the Board found that the standard practice of the Board (this was a case involving a mixed retirement and nursing home) was to include RNA's with service bargaining units but not to include RN's. We have been given no decision concerning a nursing home where the Board has required the inclusion of RN's against the position of an applicant.

The parties have adopted this practice themselves in agreeing to a full-time unit a matter of months ago, which excluded RN's (see the Board's certificate in Board File No. 3099-92-R). The Board has, on many occasions, expressed the reasons for its strong policy in favour of part-time units which mirror full-time units. As stated in *Geri-Care Nursing Home of Caressant Care Limited*, [1986] OLRB Rep. Oct. 1338, to determine that one unit

would be appropriate for part-time employees several months after the parties have agreed on a different unit for the full-time employees does not strike us as a course of action which would either facilitate organizing or contribute to effective labour relations.

Neither the Board's policy on mirror units, nor the practice with respect to RN's in nursing homes is carved in stone. However, the facts of this case are not so striking that they would cause us to depart from these and reject the unit proposed by the applicant.

We are satisfied that the unit is viable and would not in the circumstances of this case and against the backdrop of the Board's policies, the parties' agreement and the practices in the industry, cause serious labour relations problems.

Having regard to the agreements of the parties and the material before us, we find that:

all employees of Provincial Nursing Home Limited Partnership in the Town of Seaforth regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor and registered nurses, constitute a unit of employees of the responding party appropriate for collective bargaining.

The Board is satisfied on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on June 8, 1993, the certification application date, had applied to become members of the applicant on or before that date.

A certificate will issue to the applicant.

3913-91-U Michael A. Rankin, Applicant v. Local 721 of the Bridge, Structural and Ornamental Ironworkers of America, Responding Party

Construction Industry - Duty of Fair Referral - Unfair Labour Practice - Union imposing fine on complainant following trial and conviction - Union refusing to issue referral slip to complainant in response to requested name hire - Union's conduct in a number of respects found to be arbitrary, discriminatory and in bad faith - Board directing that complainant be compensated for losses flowing from violation of the Act and remaining seized

BEFORE: *Susan Tacon*, Vice-Chair.

APPEARANCES: *Ernie D. Coetzee* and *Michael Rankin* for the applicant; *B. Chercover* and *Stan Arsenault* for the responding party.

DECISION OF THE BOARD; July 23, 1993

1. This is a complaint filed pursuant to section 89 [now section 91] of the *Labour Relations Act* in which the complainant (Mike Rankin) alleges that the respondent trade union (also referred to as "Local 721") contravened section 69 [now section 70] of the Act in its refusal to issue a referral slip in response to a requested name hire of Rankin by Ryco-Alberici ("Ryco") on March 9, 1992.
2. This matter occupied some sixteen days of hearing; eleven witnesses testified and considerable documentary evidence was filed. The Board has considered the credibility of the witnesses according to the usual criteria, including their ability to resist the tug of self-interest in giving their testimony. In reaching its findings of fact, the Board has weighed the testimony of the witnesses, including their relative credibility, in the context of the documentary material and what is reasonably probable in the circumstances. The events in question cover a period of several years. The Board, in setting out its factual conclusions, has not attempted to recount that evidence in detail but, rather, has focused on those matters considered relevant to the issues raised in the complaint.
3. It is useful at this point to comment briefly on the question of credibility. Much of the testimony was not in dispute. One witness, Richard Bedard, was called in reply by counsel for the complainant. In its decision, the Board has given no weight to that evidence given that the testimony was hearsay in nature or not relevant or helpful in resolving the issues or would have constituted a "splitting" of the complainant's case. With respect to the other witnesses, the Board is of the view that, generally, the individuals were testifying to the best of their recollections. Many of the conflicts in the testimony were minor and need not be resolved. However, there were some discrepancies in the accounts of witnesses with respect to several critical events. In such instances, the Board accepts the evidence of Rankin as more accurate than the recollections of White, for example. The Board makes further comments with regard to credibility at the appropriate junctures in the decision. One additional comment is merited at this point. White testified with respect to three conversations with Jim Batchelor, general foreman for Ryco at the Bramalea plant job. Those conversations were of considerable importance in the defence of the trade union that Rankin had not been treated improperly. Given the contradictions in the testimony of Rankin and White, if Batchelor's testimony had corroborated White's version, that would have assisted the trade union's defence. However, Batchelor was not called and the Board is prepared to draw a negative inference from the failure to produce Batchelor as a witness, particularly since the union did call Bob Boatner, general superintendent on the project, to testify. The Board's comments on this aspect should not be construed as an assertion that the failure to call Batchelor was the deciding factor in the case. In the Board's view, as the reasoning *infra* makes clear, White's proffered explanations for his conduct were inconsistent with the documentary evidence and not logical in the circumstances.
4. In the above context, the Board next sets out its findings of fact.
5. The complainant, Mike Rankin, has been an ironworker and member of Local 721 for approximately twelve years. Immediately prior to the union's 1990 elections, Rankin was a member of its executive board. The events which give rise to the instant complaint commenced in the Summer of 1989. At that point, Rankin was working for Robert Globe Mechanical and was the ironworker steward on site. The foreman, also an ironworker, was Jan Jacobsen. In late June, an ironworker by the name of Clarence Cole was dispatched to the site. Cole claimed he was injured on his second day at work and submitted a worker's compensation claim. The *bona fides* of the claim were questioned by the company. Jacobsen, as foreman, wrote a letter which was submitted to the Workers' Compensation Board (WCB) outlining the sequence of events, including Cole's apparent initial assertion that he had aggravated an old injury, subsequent assertion that he suf-

ferred a “new” pulled muscle injury and his repeated refusal of light duty which Jacobsen offered, in order to go on compensation. Jacobsen’s letter, which was filed with the Board, adds that Jacobsen did not witness the injury nor did Cole inform Jacobsen on June 28 that he had been injured. The Board is not drawing conclusions of fact based on the letter as to the veracity of the injury claim. Jacobsen’s letter is relevant, however, in view of the subsequent events.

6. Rankin was asked by Jacobsen if he had witnessed the alleged injury. Rankin was angered by Cole’s claim. In Rankin’s opinion, the employer would have preferred to bring in ironworkers from the Hamilton local rather than Local 721. For Rankin, the Cole incident might well lead to the utilization of Hamilton ironworkers on site, to the prejudice of job opportunities for Local 721. Rankin testified that he saw the question as one of protecting Local 721’s jurisdiction. Rankin called the union hall and spoke to Stan Arsenault, the Business Manager, and another union officer. Rankin’s evidence that both officers were not surprised at the Cole incident and the claim for compensation was not shaken on cross-examination or contradicted. While it is not necessary to resolve the details of those conversations, their thrust was that Rankin was to assure the contractor that Local 721 would dispatch good ironworkers to the site forthwith. Rankin, however, agreed to write a letter as requested by Jacobsen outlining the incident from his perspective. It is useful to reproduce that letter [verbatim] herein.

July/6/89

TO WHOM IT MAY CONCERN;

I was working with Clarence Cole the day that he was “supposedly injured”. At around 1:25 p.m. on June 29th Clarence had told me he had a doctors appointment at 2 p.m. and he had to leave. First of all I thought it was strange that he never told us earlier of his appointment and secondly, what the appointment was for. However he left to go to his doctor and left the gang shorthanded. The next day Clarence came in and told us his “story”.

In my personal opinion there was no injury, and if there was he should have told us, I don’t know Clarence that well, but I think it was a lie, a fake, and an insult to our trade. Its guys like that who ruin our image as responsible tradesmen.

I am embarrassed of him and he should be ashamed of himself.

Confidentially Yours,

Mike Rankin

Ironworker Steward
Robert Globe Mechanical
Triple M. Metal Jobsite

7. In approximately April 1990, Rankin went to work for State Contractors as a name hire. (Rankin remained at State until mid January 1991). A name hire or request is, as the term implies, the employing of an ironworker selected by the contractor. It was not in dispute that the relevant collective agreement stipulates that an employer must maintain a 50:50 ratio of “requests” to “list”, that is, of those employed because they were name-hired by the contractor and those referred or dispatched to the site by the Local. Those dispatched to the project are those highest on the out-of-work list who are appropriately qualified. Not surprisingly, in “boom” times, the out-of-work list is short and may even be meaningless where there are more jobs than qualified workers. In tough economic times, in contrast, the list may swell to many hundreds of union members. Of note, as well, is another ratio, also 50:50, between ironworkers and millwrights. Both matters are relevant to this case.

8. Some time in the Summer of 1990, Cole approached Arsenault for assistance with

respect to his WCB claim which had been denied. Arsenault reviewed the file with Herb MacDonald, the union officer responsible for assisting members with such claims. Only the Jacobsen letter was found. However, it appears that Cole insisted Rankin had also written a letter. Arsenault subsequently examined the file again, unearthed and removed the Rankin letter; Arsenault indicated to Cole that the WCB claim would be appealed. Arsenault's opinion was that Herb MacDonald had known of and concealed the Rankin letter. Whether or not that belief was accurate is not for this Board to resolve.

9. By this point, campaigning for the October 1990 elections was well under way. In that election, two slates vied for support. One slate was led by Arsenault, who had held the position of Business Manager since 1986; the other was headed by John Donaldson, the Local President from 1978 to 1990, who was challenging Arsenault for the key post of Business Manager. Rankin was running for the position of Business Agent as part of the Donaldson slate. It is apparent that the election was hotly contested and constituted a clash of strong personalities. In the midst of the campaign, at the October executive board meeting, Rankin was asked by M. Coleman about the Cole letter; Coleman suggested that Rankin give his explanation to the executive or at the next general membership meeting. Rankin indicated that he would deal with that issue at the next general membership meeting, also in October and about ten days prior to the election.

10. Arsenault testified that, just prior to the general membership meeting, his wife received a telephone call from Cole's wife expressing concern that Cole had signed two letters that day but adding that Cole was illiterate. Arsenault's wife communicated that information to Arsenault moments before the commencement of the meeting. Not unexpectedly, the Rankin letter was raised at the membership meeting. Rankin and another ironworker, A. J. O'Brien, proceeded to read two letters dated October 17, 1990. One, by Rankin, essentially stated that he was on the job site with Cole and no one had witnessed Cole's injury. The other was purportedly signed by Cole and read:

I feel that Mike Rankin was just telling the truth about the accident. We were the only two on the job and didn't work together that day and we were hundreds of feet apart so he couldn't witness it. I have no hard feelings about Mike Rankin and I hope nobody else does.

11. At that point, Arsenault yelled that Rankin was a liar and that Cole couldn't read or write. Arsenault proceeded to read out the Cole letter (written by Rankin in 1989; see paragraph 6 above) which he happened to have in his pocket. Whether or not that was by coincidence may well be another interesting question in the rich tapestry of events and personalities which comprise this case but need not be determined by the Board. The meeting continued with a heated exchange of views on the issue.

12. On the day of the election, a brochure was handed out to the members which utilized the format of campaign literature which had been circulated earlier by the Donaldson slate but which might best be characterized as mudslinging against the members of the Donaldson team. Of significance for this complaint is the reference to Rankin. Beside his picture is a line drawing of a rat and the Rankin letter from July 1989 regarding Cole is attached to the document. Those members of the Arsenault team who testified all denied involvement in the production or distribution of the brochure. While the Board need not decide the specific authorship, it is reasonable to conclude, in the circumstances and given its content, that the pamphlet originated with one or more persons on the Arsenault slate. Whether or not the others embraced such tactics, the brochure was not repudiated by that team.

13. The Arsenault slate was elected. That team included Arsenault as Business Manager, Jim Power as Local President, Gary White as one of the Business Agents, all of whom testified in

these proceedings. In November, the new executive board was sworn in. Shortly thereafter, Rankin and O'Brien received letters requesting that they appear before the executive board at its January 1991 meeting. Rankin informed the executive by telephone that he could not appear on that day due to illness. O'Brien did appear and was questioned about the October 17 letters. O'Brien assured the executive that he had acted as a witness on both letters and that Cole was clearly aware of their contents. That explanation was apparently accepted as no further action was taken by the executive against O'Brien. Of interest, is the reference in the minutes of the meeting to the executive's view of O'Brien as a "dupe" in an attempted "cover-up" by Rankin. Evidently, O'Brien was not pleased at having to come before the executive board and demanded an apology. Apparently, a shouting match ensued over the point between O'Brien and one of the executive board members. Others intervened to defuse the confrontation. The executive board decided to again request that Rankin appear at their next meeting in February.

14. Rankin learned of the events at the January meeting from O'Brien. However, on advice of counsel (not counsel appearing at the hearing), he requested by letter to the executive board that they be more specific with respect to the reasons he was to appear. Neither Arsenault nor Power provided that information; in their view, Rankin knew the reason he was asked to appear. Rankin declined to appear at the February meeting. Rankin testified that he felt intimidated, that friends had been beaten up at the union hall and he would not come before the executive board without additional information. At that next meeting in March, the executive board concluded that their "credibility was being challenged". They demanded that Rankin appear and passed a motion charging Rankin under the constitution. Rankin was notified by mail of the charges and that, should he not appear, the trial would proceed in his absence.

15. The charges read: Article XIX section 10, page 50; Article XXVI, section 18 and 19, page 105; Section 28 of the general working rules, page 11. Corresponding to each item was the notation: (1) Failed to assist a member while acting as a steward; (2) Failed to assist Executive Committee with their investigation; (3) While acting as a Union Steward, (Rankin) wrote a letter against another member of Local 721 (the Cole letter). The first and third items related to the Cole incident; the second to the failure of Rankin to appear before the executive board.

16. Jacobsen was not charged over the letter he wrote regarding Cole. Further, Jacobsen apparently testified on behalf of the company in Cole's WCB hearing. In the view of the union executive board, the Jacobsen letter was not damaging because Jacobsen just "stated the facts" and had not witnessed the alleged injury. Rankin did not testify at the Cole hearing and there is no evidence as to whether or not his letter was before that tribunal or whether it was given any weight. To the union executive board, however, Rankin had an obligation as steward to "assist" Cole and, rather than assist, had slandered Cole. Thus, Arsenault, for example, opined that the union could win the case for Cole "on the evidence" notwithstanding Jacobsen's letter and testimony but that the Rankin letter was hurtful to their position.

17. Rankin did not appear at the March executive board meeting because he felt he would not receive a fair trial. The trial did proceed in his absence and the executive board unanimously found Rankin guilty. An excerpt from the minutes of the executive board meeting reads:

The resolve of the ensuing discussion was that Rankin had shown no remorse, had tried to cover up his actions according to the two letters he had written after the first one, and had ample time to respond to the charges.

The penalty was then discussed. Several motions were moved and defeated: to fine Rankin \$10,000; to expel him from the union; to fine him \$200.00 with a ban on running for office for two terms; to fine him \$500.00 for his actions, \$500.00 for failing to appear before the executive board

and ineligibility to stand for election for six years. What was carried was a fine of \$5,000.00 or his actions, \$500.00 for failing to appear before the executive board and ineligibility to run for office in Local 721 for six years. According to Arsenault, Rankin was punished for the initial Cole letter, the "cover-up" letters of October 1990 and for failing to appear before the executive board as directed.

18. It is appropriate to note at this juncture that some evidence was introduced with respect to the quantum of fines imposed by the executive in other cases. The usual range of financial penalties appears to run from \$25.00 to \$300.00. The only fine which the union could point to greater than the range mentioned was one imposed on a Tony MacDonald in the amount of \$2,500.00 apparently for misconduct which included harassment of the union secretaries and dispatcher. The details of MacDonald's offences were not clear nor are they particularly relevant. What is noteworthy is that Tony MacDonald was permitted to apologize for his misconduct and the fine was waived.

19. Rankin was notified of his conviction and penalty by letter dated March 18, 1991 from Jim Power, the Local President. The letter also indicated that Rankin had a right of appeal under the International constitution.

20. Rankin filed a complaint in March 1991 against the Local with the Labour Relations Board. That complaint was dismissed by the Board without a hearing on the ground that the complaint did not state a *prima facie* case in that it dealt with internal trade union affairs.

21. Rankin did exercise his right to appeal his conviction to the International. Rankin also requested of Power a copy of the minutes of the trial by the executive board. He was informed by Power that the documentation would be available from the International following its investigation. It appears, however, that Rankin never did receive a copy of the trial transcript from either the Local or the International. An investigation was conducted by J. Phair on behalf of the International. Evidently, Phair questioned Rankin and others about the events. In December 1991, the International informed Rankin and Local 721 that the conviction was sustained but that the penalty was reduced to \$300.00 in total and without any restriction on standing for election for union office. Rankin was also to apologize to Cole at a regular monthly membership meeting.

22. During the period of the appeal, Rankin continued to pay union dues and did not pay the fines initially imposed, as was his right under the constitution. In May 1991, Rankin was nominated for election as a delegate to the next union convention in August of that year. Power ruled that the constitution permitted Rankin to stand for election as a delegate; Rankin, however, was not so elected.

23. In April 1991, Rankin was "name-hired" by Calorific Construction and he sought a referral slip from the union hall. The dispatcher, Jim MacDonald, initially refused to issue the slip. Rankin spoke with Gary White, another Business Agent, whom Rankin regarded as a friend. White responded that Rankin's request put him (White) "between a rock and a hard place" but agreed to intercede with MacDonald. In White's view, he was able to persuade MacDonald to approve the referral because the foreman on the job had been of assistance to Local 721 in hiring additional ironworkers. Several days later, a referral slip, signed by MacDonald, was issued to Rankin and delivered to the job site by White. Keith Fowler was the steward on the Calorific job. After checking with the union hall, he permitted Rankin to start work on the site pending the resolution of the referral slip issue.

24. Between the Calorific hiring and the release of the International's decision regarding the appeal in December 1991, Rankin testified against White in a criminal case. Following Ran-

kin's testimony, White pleaded guilty to assault. White testified before the Board that this event in no way changed his view toward Rankin. Rankin believed that it was his testimony which turned White from a "friend" to part of the "enemy camp" and directly led to the incident on the Ryco job which triggered this complaint. In the Board's view, it is not reasonable to conclude that White would regard Rankin with equanimity following Rankin's testimony against him in the criminal trial. This assessment is buttressed by the explanations proffered by White for his actions regarding the Ryco request for Rankin. That issue is further discussed later in the decision.

25. As noted earlier, Rankin continued to pay union dues pending the disposition of his appeal and was "paid up" to January 1992. If a member falls into arrears with respect to dues payments, the member is no longer "in good standing" and, for example, could not attend monthly membership meetings. As well, the union steward on the job site could request that a member show a current dues receipt in order to commence or continue working on site. In fact, it appears that a six month "grace period" was allowed with respect to dues payments. If a member fell more than six months into arrears, he was "suspended" from membership in the union; to be reinstated, payment of \$800.00 in addition to dues arrears was required. During the period of suspension, as a non-member, the individual could not be referred to job sites or be name-hired.

26. The International's decision upholding the conviction but reducing the penalty to a \$300.00 fine and requiring Rankin to apologize to Cole was released in early December 1991. The fine was required to be repaid at a rate of \$20.00 per day based on a five day work week. The executive, however, did not contact Rankin with respect to repayment until March 1992. By that date, Rankin had also fallen into arrears with respect to his dues.

27. Rankin was laid off in late February 1992. In January and February, Rankin was not asked to show his dues receipt on site. On receiving his layoff slip, Rankin went to the union hall to register on the out-of-work list; at that point, a secretary in the union hall issued a "certificate of good standing". Rankin then forwarded to the union a cheque for the equivalent of three months' dues. A notation of the outstanding fine had been entered on the computer against Rankin's name. When the secretary received the cheque, she asked Power how to proceed. Power contacted Rankin by letter dated March 2, 1992 indicating that the fine and apology had not been discharged and were due as Rankin had not filed a notice of further appeal. The March 2 letter was not received by Rankin for several days; Power testified that his decision in this regard was made prior to the issue of the referral to the Ryco job arose. It was also communicated to Rankin in a telephone call by the secretary that Power had indicated that the monies sent to the union would be first applied against the fine and could not be accepted as dues. Rankin then demanded his cheque be returned, as it was, a few days later.

28. Rankin testified that he was disturbed at having to pay a fine at all for, in his words, "telling the truth". He testified that he never stated that he refused to pay the fine and apologize, just that he was not prepared to do so at that point. Rankin did not feel any apology was needed as he and Cole had talked the matter over and resolved the issue between them. Rankin also thought that there might be another level of appeal open to him following the December decision of the International and was seeking legal advice in that regard. A belief in the right of a further appeal within the International, to the next convention, was also held by Power, the Local President. By letter dated March 9, 1992, Rankin did lodge a further appeal to the International. That body informed Rankin by letter of March 11, 1992, that no further appeal was possible under the constitution. Further, it is required that a financial penalty, if imposed, be satisfied before monies may be accepted toward dues payments.

29. It is necessary to briefly sketch the dispatch system before proceeding to outline the

events of March 9 which form the core of this complaint. As mentioned, members may solicit work and be "name-hired" by contractors or are dispatched to job sites through the union hall. If a member is requested by a contractor, the member must obtain a referral slip from the union before commencing work. According to the dispatch guidelines, the slip is to be marked "R" (for "request"). Likewise, if a member is dispatched, the member must first obtain a referral slip. Generally, no notation is marked on "list" referrals, although, rarely, an "L" might be noted. At the relevant period, one of the Business Agents rotated through the dispatch office each week. Business Agents also are assigned a specific geographical area for which they are responsible. At the relevant time, the rotation consisted of White, Aaron Murphy, Power, Tony Almeida. All slips are to be signed by the dispatcher on duty that day. The slips indicate the contractor, job location, date to start and other such data. One copy is kept by the union in its records. The individual presents one copy to the union steward on site. One copy is provided to the company for its records.

30. It was not in dispute that, in practice, a member need not always appear in person at the union hall to pick up the referral slip. A member could call in to the union and make alternate arrangements. For example, if a number of slips are issued to persons on the same job site, one of the crew might pick up the slips for everyone. Another ironworker on site could drop by the union hall and obtain a referral slip for a fellow member. Or, the Business Agent for the geographical area in which the project is located may bring the slip(s) to the site on his next visit. On occasion, a referral slip may be faxed to the job site where, for example, the individual lives near the job site and at some distance from the union hall. There is no doubt that an individual who works without a referral slip violates the union's regulatory scheme and may be subject to internal union discipline. However, it was acknowledged by the union officials who testified that a member might commence work on occasion without previously obtaining a referral slip provided arrangements to obtain the slip (by fax, delivery by the Business Agent or other member, etc.) had been made and communicated to the steward on site. Indeed, it was conceded that, in an emergency situation, for example, where an ironworker was called in to work on a weekend and could not contact the union hall or a Business Agent/Business Manager prior to starting, it was acceptable to start work and obtain the appropriate documentation on the following Monday. The home telephone numbers of the Business Manager and the Business Agents are not posted in the union hall but are known to many members and those officials are frequently contacted at home.

31. Local 721 has promulgated various "Dispatch Guidelines" over the years. The current guidelines, which need not be referred to in detail, contain a number of provisions regarding the operation of the dispatch system but also preserve a considerable discretion in the dispatcher with respect to the implementation of those guidelines. The guidelines establish a Dispatch Committee to investigate problems a member might raise with respect to the dispatch system or a specific referral.

32. On Friday, March 6, 1992, Rankin called the union hall seeking a referral slip as a request hire at State Contractors. Rankin spoke to White who refused to issue a slip. White explained that State had just laid off several ironworkers who had recently been dispatched to the job. The company was no longer in compliance with the 50:50 ratio of requests to dispatch. In White's view, those persons had to be recalled before a request hire would be approved. The "boom times" in construction had ended for some time and, by March 1992, the out-of-work list ran to many hundreds of members. Rankin accepted that explanation without objection. No referral slip was issued.

33. The next day, Saturday, Rankin contacted a fellow ironworker, Merv Lane, who was then working for Ryco at the Chrysler plant in Bramalea about the possibility of work. Ryco had asked Rankin to work for them while Rankin was still employed at the Calorific job in November

1991; Rankin had declined. It should be noted that Keith Fowler had also worked on the Calorific job; he requested a layoff from Calorific on November 30, 1991 in order to accept a job at Ryco in Bramalea commencing December 3, 1991. That request referral was approved and Fowler was the ironworker steward on the Ryco job.

34. Rankin went to the Ryco site on the Saturday and met Joe Culham, an ironworker foreman, and Bob Boatner, the general superintendent. Boatner indicated Ryco had just hired two millwrights and was not hiring any ironworkers right then. However, Rankin was telephoned by Culham that evening and asked to work the next day, Sunday, as he (Culham) had been injured and an emergency situation had arisen wherein Ryco needed another ironworker. Rankin replied that he was not sure he could start work without a slip; he tried to contact the union hall that evening but without success. Rankin testified that he did not try to contact the Business Manager, Arsenault, or the Business Agent for the site, White, at home because he did not have their home phone numbers. Whether that reason was the sole motivation for not trying to reach the officers at home is not necessary to determine given that Jim Batchelor, the general foreman, obtained the approval of the assistant union steward on site, Larry Porter, to have Rankin start work on the Sunday without a referral slip. Porter, who acted as steward in the absence of Fowler (who was not at work on the weekend), indicated that Rankin was to call the union hall on the Monday morning to obtain the necessary referral slip.

35. Rankin did work that Sunday. He was approached by Fred Sleiman, the ironworker steward for Comstock, another contractor at the Bramalea Chrysler site, but whose work area was quite distant from the Ryco location. Sleiman, a friend of White, was aware of Rankin's fine and conviction and that Rankin had testified against White in the criminal trial. Sleiman knew Fowler was not at work that day but stated he did not know Porter, as assistant steward, was acting in Fowler's stead. Sleiman asked for Rankin's referral slip and dues receipt. Sleiman testified that Rankin assured him that White had personally approved the referral. The Board does not accept that testimony and prefers the account of Rankin that he told Sleiman that Ryco had requested he start Sunday and that the slip would be sorted out the next morning. The Board regards that account as more probable in the circumstances, particularly given the evidence of Porter.

36. On Monday morning, Porter informed Fowler that Rankin had worked on Sunday with his (Porter's) approval; Fowler did not express any concerns at that point regarding Rankin's presence on site. Fowler met Rankin and Batchelor and asked for the referral slip. Rankin stated that he had spoken with Murphy and the slip was coming. Fowler contacted Murphy at the union hall and, in Fowler's words, once he had done so, it was "out of his hands", notwithstanding that there was, as yet, no referral slip on site.

37. Rankin, in fact, had called Murphy, who was the dispatcher for that week, at 7:00 a.m. before starting work. Rankin outlined the situation. Murphy indicated Rankin could start work but that Batchelor should contact the union right away. Murphy was aware of Rankin's conviction and fine but was not a member of the executive board. Murphy stated that he did not foresee any difficulty in getting the request approved provided the 50:50 ratio was satisfied. Rankin asked whether the company could fax the request and the referral could be faxed back to the site. Murphy reiterated that Batchelor should call and that the question would be straightened out. Murphy wanted the request from Ryco to be in writing and on file because of the high number of unemployed union members. By the time Rankin arrived on site, Batchelor had already spoken to Murphy and faxed the request for a referral slip for Rankin. Murphy and Batchelor discussed the 50:50 ratio; Batchelor apparently stated that there were slightly more lists than requests on site at that point. Murphy informed Batchelor that he would check with White but did not anticipate any problems. Murphy updated White on the situation and left it for White to resolve.

38. When the fax from Ryco arrived, White telephoned Arsenault for advice. Arsenault indicated that Ryco was a fair employer, that White should try and have Ryco take an ironworker from the list as well as Rankin but that Rankin should come in to the union hall and be issued a referral slip. White raised the question of the dues arrears and fine; Arsenault responded that the referral slip was a separate issue and that the "dues and fine" would take care of themselves, i.e., Rankin would eventually "go suspended" if the monies were not paid.

39. In his testimony, Arsenault stated that he did not anticipate a problem would develop over the issue; i.e., Rankin would appear at the union hall and be issued a referral slip. Arsenault agreed that special arrangements could be made for faxing or delivery by the Business Agent, White, of the slip to the site. It was Arsenault's understanding that no such special request had been made, that Rankin simply refused to come to the hall to obtain a slip and that Rankin had no intention of complying with the requirement that a referral slip be obtained. In fact, as noted, Rankin had requested of Murphy that the slip be faxed because his home was close to the work site in Bramalea. The Board will return to this question.

40. White then faxed the following letter to Ryco:

I am in receipt of your fax dated March 10th 1992. I must inform you that you are in violation of our collective agreement, more particularly, Article 2.1(a) - Union Security.

Whereby, Mr. Rankin has not been issued a valid referral slip from this Local Union, Mr. Rankins (sic) must immediately attend at this office 1604 Bloor St. West, Toronto. If this request to you is not honoured this union will charge Ryco-Alberici under Section 124 of the *Ontario Labour Relations Act*.

If you require any additional information, please do not hesitate to contact me.

Article 2.1(a) deals with a number of items, including a requirement that an employer only hire persons who present referral slips, the right of an employer to "name-hire" and the limitation of those name-hires to no more than 50% of the workforce.

41. White testified that Batchelor telephoned him upon receipt of the fax. White apparently demanded that Rankin appear at the union hall immediately and asserted that Batchelor was "fooling around" with the ratio of name-hires to list referrals. The Board has further comments on this and other ostensible conversations between Batchelor and White *infra*. Later that afternoon, White contacted Fowler at the Ryco job and asked Fowler to send him a list of ironworkers on site and marked as dispatch or request. Fowler did so and that document was filed with the Board. White testified that he did not think Fowler's list was entirely correct.

42. Rankin was informed by Batchelor that there was a problem with his presence on site and that Rankin should get the matter straightened out. Rankin called the union hall and spoke with Power as White was out of the office. Before leaving for lunch, White had told Power that Rankin had gone to work at Ryco on the weekend without a referral slip, that there were enough referrals on the site already and, if Rankin called, have him call back so that White could speak with him.

43. There were some differences in the accounts of Rankin and of Power as to their conversation. According to Power, Rankin was emotional and Power merely emphasized that Rankin should come to the union hall and pick up a referral slip. Power added that Rankin should straighten out the problem of the fine and dues when he was at the hall, as well. Power acknowledged that Rankin stated that Murphy had approved the referral provided that the 50:50 ratio checked out. Rankin's recollection was that the bulk of the brief conversation dealt with the fines

and dues issue and the 50:50 ratio was not raised until the close of the call. Rankin indicated he would file a complaint at the Labour Relations Board if the referral slip was refused. In the Board's view, it is more reasonable to conclude that there was reference to the dues and fine issue, particularly given the fact that Power had just returned Rankin's dues cheque and sent a letter to Rankin indicating that the fine had to be paid before dues would be accepted and Rankin should do so forthwith so as not to "go suspended." Beyond this finding, the Board need not resolve the finer details of the conversation.

44. Rankin then called back and spoke with White. The conversation was heated. According to Rankin, White said that he would not be issued a slip unless the dues and fine were paid and that Murphy had made an error in approving the referral because Murphy was not familiar with the ratio of lists to requests on site. Rankin denies there was any reference to White's interest in pulling Rankin off the job in order to get another ironworker dispatched to the site. White denies any reference to paying the fine and dues first. White described Rankin as paranoid and that Rankin did not want to understand White's concern that, if Rankin came into the hall, White might be able to get another ironworker dispatched to Ryco. The Board understands that a person's recollection of events is subject to the pull of self-interest and, when the events in question take place in an emotional context, the likelihood of accurate recall is further diminished. With respect to this conversation, the Board is satisfied that there was reference to the dues and fine payment in relation to the issuance of the referral slip for reasons which will be dealt with *infra*. The 50:50 ratio did surface in the conversation in the context of Rankin's assertion that Batchelor said the ratio was fine and White's response that Batchelor might be lying in giving that assurance.

45. Rankin did not obtain a referral slip; his Record of Employment, issued By Ryco, indicated "union interference" as the reason for the termination of his employment. White testified that Rankin would have received a referral slip had he appeared at the union hall. Further, White testified that, in a conversation with Batchelor the next day, Batchelor commented that Rankin's departure did not matter as Ryco was laying off men anyway. Again, White's credibility is dealt with *infra*. In any event, Rankin filed this complaint with the Labour Relations Board on March 10, 1992.

46. Given the number of hearing days, witnesses and exhibits, each counsel filed, in writing, a factual distillation of the evidence to facilitate the Board's understanding of their respective submissions. The parties' representations are next set out in highly abbreviated form. There was no dispute that there was a collective agreement between the union and Ryco at the relevant period, that the union did operate a hiring hall to supply workers to Ryco, either by request or from the list, and that the complainant was a person within the meaning of [now] section 70 of the Act.

47. Counsel for the complainant reviewed the evidence with respect to the trial, penalty and appeal process and concerning the request hire by Ryco of Rankin in March 1992. It was contended that the union's witnesses, other than Murphy, Boatner and Porter, should not be found credible. Counsel argued that the union records of those dispatched or name-hired at the Ryco job did not support the explanation offered that there were too many requests on site. Further, it was submitted that there was no plausible explanation, given the union's practice of alternative delivery of referral slips to job locations, for the union's insistence that Rankin physically attend at the union hall in order to obtain a referral slip. Counsel reviewed the standard implicit in the duty of fair referral, as outlined in the jurisprudence. In counsel's view, the union's decision was arbitrary in that the union officers did not direct their minds to the merits of Rankin's request, did not enquire into or act on the available evidence, considered irrelevant factors and displayed an indifferent attitude. Given the history of Rankin's relationship to the executive, it was asserted the union's denial of the referral slip constituted a bad faith decision. Finally, counsel contended the

decision also breached the duty not to discriminate in that others were not so treated. Counsel reserved his right to argue for costs, should the complaint be upheld and the parties be unable to resolve the issue of the quantum of damages. Counsel, as well, asked that the Board remain seized with respect to remedy if that could not be resolved between the parties. Cases referred to in support included: *Joe Portiss*, (1983), 4 CLRBR (NS) 69 (OLRB); *John Cooper*, [1984] OLRB Rep. Jan. 6; *John Bellenger*, [1984] OLRB Rep. Aug. 1039; *Thomas Beck*, [1985] OLRB Rep. Jan. 14; *Ron Lawrence*, [1986] OLRB Rep. Sept. 1241; *Michael Alfred Jones*, [1988] OLRB Rep. April 403; Sack & Mitchell, Ontario Labour Relations Board Law and Practice, 1985 (excerpts).

48. Counsel for Local 721 extensively reviewed the relevant jurisprudence and the evidence in support of his submission that the complaint should be dismissed. Counsel asserted that the fact that Rankin had outstanding dues and a fine was a relevant concern of the union officers but that the union did not suggest that the unpaid monies were the reason Rankin had to come into the union hall to obtain a referral slip. Counsel reviewed the evidence with regard to Rankin's trial and appeal but submitted that the Board's caselaw established the proposition that the Board refuses to intervene in internal union affairs. White's insistence that Rankin appear might be characterized as an error in judgement but did not contravene the duty of fair referral. Counsel argued that the issue was not one of fair referral but a layoff, that the collective agreement had not been complied with and Rankin was refusing to comply with his obligations to pick up a referral slip. With respect to credibility, counsel submitted that Rankin was not a credible witness. In summary, counsel contended that White had taken into consideration the relevant factors in requiring Rankin to attend at the union hall and that the issue arose from Rankin's refusal to comply with the union's reasonable conditions. Cases referred to: *John Cooper*, *supra*; *Kazik Pawlak* [1984] OLRB Rep. Nov. 1597; *Antoine A. Plennevaux*, [1990] OLRB Rep. Dec. 1314; *Thomas Beck*, *supra*; *Ontario Hydro*, [1980] OLRB Rep. July 1039; *John Craddock*, [1987] OLRB Rep. Dec. 1488; *David A. Spackman*, [1991] OLRB Rep. Aug. 1006; *Joseph E. Habib*, [1987] OLRB Rep. Dec. 1501; *Michael Alfred Jones*, *supra*; *TNT Railfast*, [1985] OLRB Rep. May 760; *Beckett Elevator Limited*, [1986] OLRB Rep. Nov. 1493; *Wilco-Canada Inc.*, [1983] OLRB Rep. June 989; *Rudy Piluso*, [1985] OLRB Rep. Feb. 313; *Donald McConvey*, [1986] OLRB Rep. June 758.

49. This complaint essentially alleges an abuse of the hiring hall system, that Rankin was denied a referral slip despite a request for his name hire by Ryco because of an arbitrary, discriminatory or bad faith decision by Local 721. It is useful, therefore, to begin with reference to the oft-quoted passage from *Joe Portiss*, *supra*, commenting on the nature of the hiring hall system:

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls in The Maritime Industry*, Sub-Committee On Labour Management Relations of Senate Committee On Labour And Public Welfare, 81st Cong. (2d) ses. 100-01 (1950) and Bastress, "Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls [1982] West Virginia Law Review 31). If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvas numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and

recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.

8. To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system effectively vests in those union officers' powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

50. Then section 69, now section 70, of the Act stipulates that:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

There is no dispute, as noted, that there was a collective agreement between the union at Ryco at the relevant period pursuant to which Local 721 operated a hiring hall to supply workers to Ryco, either dispatched from the out-of-work list or name hired by the employer, and that Rankin was a person to whom the obligation in the statute applied.

51. In fleshing out the concepts of arbitrariness, discrimination and bad faith, the Board has, not surprisingly, incorporated the analysis and reasoning first developed in the related obligation in section 68 [now 69] of the Act, commonly referred to as the duty of fair representation, albeit within the context of the hiring hall. The Board has regarded as hallmarks of "arbitrariness" the failure to direct one's mind to the merits or to conduct an appropriate investigation, decision-making which ignores relevant factors or is influenced by the irrelevant, or an attitude reflective of caprice or indifference. Such culpable conduct is distinguished from that which is merely negligent or the product of an honest error which circumstances have been held not to contravene the statutory obligation. Discrimination, as that term is utilized in the statutory provision, encompasses distinctions among persons to whom the obligation is owed on grounds which are overtly improper, such as race or religion, or otherwise without cogent foundation in the legitimate interests of the trade union in question. Indicia of bad faith have included hostility or ill-will directed to the complainant, conscious misrepresentation and similar misconduct. These principles have been articulated and elaborated upon in the jurisprudence over the years, including that cited by counsel, and need not be set out herein in detail. Indeed, the standards developed by the Board were not the subject of debate between the parties in the instant case; what was vigorously contested was whether the circumstances in question fell afoul of those criteria.

52. The Board first deals with the events surrounding the Cole letter and the Rankin conviction at the executive board. The Cole letter was written by Rankin in July 1989 but did not become public until the October 1990 election campaign. The sequence of events leading to the disclosure of the letter is ultimately irrelevant to this complaint. What is of note is the use to which the letter was put. At the general membership meeting just prior to the election and in the election literature directed against the Donaldson slate which was distributed on election day itself, the

Cole letter was utilized to discredit Rankin amongst his fellow union members. The sketch of a "rat" beside Rankin's photograph in the election day brochure dramatically conveys the intended message. The Board is not naive about the "rough and tumble" of trade union elections or election propaganda. Nor does the Act impose an obligation of politeness or comradeship. But, the Cole letter, following the election of the Arsenault slate, continued to haunt Rankin. The issue did not end with the election and it is those further events which do concern the Board in the context of the duty of fair referral.

53. Almost immediately upon the swearing in of the new executive, Rankin was requested to appear before the executive board to explain his conduct. Rankin declined to appear at the January meeting. O'Brien, who had also been summoned, did so. Despite references in the minutes of the executive board meeting to O'Brien playing the role of a "dupe" in an attempted "cover-up" by Rankin, the executive board did accept O'Brien's explanation that Cole fully understood the contents of the October 17 letters.

54. The executive board proceeded, following Rankin's non-appearance at the February meeting, to charge him. The charges, noted in paragraph 15 above, focus on the Cole incident and Rankin's failure to attend before the executive board. Rankin was then convicted, in absentia, at the March meeting. The decision to proceed with the charges, in the circumstances, does raise a suspicion of hostility or ill-will directed against Rankin personally. Power, in testifying, acknowledged that there was nothing in the Cole letter which was incorrect and that the letter merely expressed Rankin's opinion. Power also agreed that, if a member faked an injury, it would hurt Local 721. It was suggested before the Board that the Jacobsen letter simply stated the facts and, thus, would not negatively effect Cole's application to the WCB, in contrast to the Rankin letter. In the Board's view, that is a difficult proposition to accept. The recitation of facts in the Jacobsen letter is much more damaging to an adjudicator's conclusion as to the *bona fides* of Cole's claim than the opinion of a fellow worker who did not witness the event in question. The Board is not suggesting that Jacobsen should have been charged; the union properly acknowledged that Jacobsen, as foreman, was under an obligation to his employer to document the incident to the best of his ability. Nor is the Board condoning Rankin's decision not to appear at the executive board as requested. However, at the point the executive proceeded to convict Rankin, the executive board also had before it the October 17 letters, wherein Cole expressed no rancour or assertion that Rankin was lying in the Cole letter of July 1989 and Rankin's confirmation that no one witnessed the alleged accident, and O'Brien's affirmation that Cole understood the contents of the October 17 letters was accepted. To proceed to convict Rankin suggests that the Cole matter was pretextual, that the executive, indeed, was "out to get" Rankin.

55. Such suspicions are only reinforced when one has regard to the penalty imposed: a \$5,500.00 fine and a bar against standing for Local elections for six years. As noted above, the trade union's usual range of financial penalties appears to run from \$25.00 to \$300.00 and, apart from the \$5,500.00 fine imposed on Rankin, the only fine which the evidence indicates exceeded that range was a \$2,500.00 fine which was subsequently waived when the transgressor apologized for his misconduct. It was argued that the penalty reflected the executive board's displeasure and frustration with Rankin's failure to appear before it. The difficulty with this proposition is that the penalty expressly stipulates that only \$500.00 is attributable to the "failure to assist the executive committee in their investigation". Quite simply, the quantum of the penalty imposed on Rankin, given the usual range of fines and the single exception just noted, is redolent of discrimination and bad faith. The Board is not here formally striking down the conviction or penalty; that would constitute improper interference with internal trade union affairs in the absence of statutory jurisdiction to do so. What the Board may properly do, however, is look to such internal trade union pro-

cesses in assessing whether subsequent conduct affecting a complainant in his/her employment context is the product of bad faith and/or discrimination.

56. The penalty imposed by the executive board was appealed and, following the investigation by a representative of the International, the conviction was upheld, the fine was reduced to \$300.00 in total and the bar against standing for Local office lifted. The dramatic reduction in the fine, to approximately 5% of the initial level, underscores the Board's concerns with the executive board's initial decision. The decision of the International, however, does not "cleanse" the original conviction and penalty. The Board has no evidence as to the reasoning or motivation for the International's decision. Further, the \$300.00 fine was to be paid at the rate of \$20.00 per day, based on a five day work week. Until the fine was discharged, Rankin could not pay dues and, thus, was at risk of "going suspended" where he would lose the right to obtain referral slips and would be subject to a significant reinstatement fee. The instant facts do bear a resemblance to those in *Ontario Hydro, supra*, and the Board returns to this issue when dealing with the appropriate remedy.

57. It is important to emphasize that the acrimonious relationship between Rankin and the incumbent union officials, of itself, is not the concern of the Board pursuant to its statutory authority unless that relationship is manifested in the refusal of the union to issue a referral slip to Rankin. In such circumstances, the Board examines the reasons for the refusal measured against the standard set out in the Act that the decision not be arbitrary, discriminatory or in bad faith. For the reasons given, the Board has concluded the executive expressed "hostility" or "ill-will" toward Rankin in the conviction and penalty already described. However, that "hostility" or "ill-will" remained "in the air", as it were, until March 1992. The decision to refuse the referral slip was made by White. White was not a member of the executive board which convicted Rankin. Indeed, it appears that White had earlier interceded with Jim MacDonald on Rankin's behalf in order to obtain a referral slip for Rankin for the Calorific job, as outlined in paragraph 23. Subsequent to the Calorific referral slip incident, Rankin testified against White in criminal proceedings wherein White then pleaded guilty. The Board, as noted, rejects White's assertion that this had no effect on his view of Rankin. For reasons given below, the Board need not determine whether White, in refusing to issue the referral slip for the Ryco job, was acting entirely for his own reasons or was acting as surrogate for the union executive. The Board has concluded that the reasons proffered for White's conduct do not withstand scrutiny.

58. White offered several, often contradictory, explanations for his actions on March 9. The Board intends to deal with each. At one point, White testified that Ryco had more requests than list workers on site at the relevant time. The evidence does not support that conclusion. The numbers appear to comply with the 50:50 ratio. When confronted with that, White stated that he considered those workers who had been employed by Ryco on the "truss" job at the Bramalea plant but were transferred to the "mechanical" side as "requests". White conceded that there was no support in the dispatch guidelines, constitution or bylaws for such a conclusion. Indeed, no referral slip is needed or issued to members who are transferred by the employer from one site to another. Moreover, that proposition runs directly counter to the objective of the union to maximize the number of "lists" on site wherever possible. Simply put, if an employer is free to select amongst those workers retained and those who initially were dispatched are to count as "requests" if transferred, there is a disincentive to retain the original "list" workers in favour of "requests". White testified that Batchelor acknowledged, in the week prior to March 9, that there were more requests than list workers. Batchelor was not called to corroborate this testimony and, given the other contradictions in White's evidence, this explanation is rejected as self-serving and lacking credibility.

59. White testified extensively about how the business agent for the geographic area would be in a better position than the dispatcher to know about the 50:50 ratio on any particular site and

how notes would be left by the outgoing dispatcher to keep the replacement in any week updated. White also testified that the steward on the project was best placed to assess the numbers. White testified about the predilection of employers to manipulate the hiring hall system to maximize the number of requests. Even if all that is accurate, it is of no assistance to White in the instant case. For example, White did not request that Fowler fax the list of ironworkers on site, marked as "list" or "request" until after he sent his "ultimatum" to Ryco. White stated that he contacted Fowler to confirm the accuracy of the fax to Ryco. To check with Fowler following the faxing of the ultimatum is itself suspicious when it is Fowler who, according to White, is supposed to possess the most accurate information. Further, when Fowler's markings did not support White's calculations, White asserted that Fowler was in error. To give another example, Fowler stated that he kept White up to date with the 50:50 ratio, that there had been no problem with that ratio two weeks before March 9 when Fowler had sent a similar list to White and that the numbers had not changed since then. Murphy, as well, testified that White had expressed no concerns prior to March 9 about the 50:50 ratio at the Ryco job. White had been the dispatcher in the previous week and, yet, did not indicate to Murphy, as would be expected when Murphy took over the rotation, that a problem with the ratio existed at Ryco. It is difficult not to conclude that there was no problem with the 50:50 ratio at Ryco; the only difference was that, on March 9, Ryco sought to name hire Rankin.

60. This conclusion is reinforced by the testimony of Power and Arsenault that Ryco had a reputation as a fair employer and that Ryco was not one of the "manipulators". Beyond that testimony, the documentary evidence is dramatic: the referral slips indicate that, of all the ironworkers employed by Ryco at the Bramalea plant, only approximately sixteen of sixty were requests. When confronted with those numbers, White responded that the referral slips might be inaccurate in that the requests were not so marked. That is not plausible given the importance of the 50:50 ratio, the importance of accurate referral records, the dispatch guidelines which require such notations and the experience of the dispatchers as business agents who have their own geographic areas to monitor and therefore understand the value of making the requisite notation.

61. The usual sequence of events which a business agent or dispatcher would follow in dealing with an employer who had more requests than list workers was not followed in this case. It was recognized that, at times, the requests would exceed the numbers who had been dispatched. The business agent would contact the company and seek to rectify the imbalance. The means chosen would reflect the merits of each individual case. For example, where the contractor was continually trying to manipulate the ratio in favour of requests, the employer might be told that no further requests would be approved until the ratio was restored or that the next three or four persons had to be from the list. With another employer, State Contractors, the ratio of requests to list reached 18:1 before White filed a grievance against the contractor. None of the witnesses recalled a circumstance similar to that with Ryco wherein a union official sought to pull a man off the job where the company was in non-compliance with the 50:50 ratio. Nor could any witness recall seeing a letter couched in the terms of the fax to Ryco that Rankin had to leave the site immediately to obtain a referral slip or the union would file and refer a grievance against Ryco to the Labour Relations Board. The dispatcher Murphy, for instance, testified that he would never tell a company to pull an employee off the job especially in tough economic times, that he had never seen a letter like that sent to Ryco and that if there was a problem with the ratio, the union's recourse was against the company, not the individual worker. White also conceded that Fowler had expressed concerns the previous week about the ironworker:millwright ratio at the Ryco site and that Rankin's presence helped that ratio from Local 721's viewpoint. This factor, as well, does not support White's conduct on March 9.

62. The text of the fax to Ryco is somewhat ambiguous in its reference to article 2.1(a) of the collective agreement which deals both with the requirement that there be a 50:50 ratio of

requests to list workers and the requirement that a member must present a referral slip before commencing work. At the hearing before the Board, the union asserted that Ryco had violated the 50:50 ratio and that Rankin had acted improperly in starting work on the Sunday without a referral slip. Much was made of the apparent failure of Rankin to telephone Arsenault or White on the weekend for approval. And, it was contended that the real problem was Rankin's refusal to come to the union hall to pick up a referral slip rather than a refusal by White to issue the slip. In the Board's view, those assertions are not sustainable on the evidence. The Board has already dealt with the fact that Ryco was not in violation of the 50:50 ratio and turns to the referral slip issue.

63. When Rankin was asked by Ryco to work on the Sunday, Rankin testified that he called the union hall without success. As noted earlier, whether Rankin could or should have called Arsenault or White at home on the Saturday evening is irrelevant since Ryco obtained the approval of the acting steward on site, Porter, for the Sunday start. That Rankin worked on the Sunday without a referral slip was not improper. Indeed, the evidence indicated that, on occasion, persons did commence work without a slip where prior approval had been obtained. Rankin then telephoned the union hall at 7.00 a.m. Monday morning to obtain a slip. Rankin candidly informed Murphy, the dispatcher that week, of the circumstances in which he started on Sunday and that Ryco was requesting a name hire. That, too, was the proper course of conduct for Rankin. Murphy, whom the Board regards as a credible witness, indicated that Batchelor should contact him directly but that he did not anticipate a problem if the ratio was satisfied. Murphy testified that he had no difficulty with Rankin working on the Monday pending resolution of the referral slip issue. For Murphy, it was important to have a written request for the name hire on file given the unemployment situation. Murphy agreed that Rankin asked that the request by Ryco and the referral slip be faxed to and from the union hall. Rankin lived close to the work site in Bramalea and at a distance of forty kilometers from the union hall. Such arrangements were acknowledged to have occurred in the past in similar circumstances. Arsenault testified that it was his understanding that Rankin had not requested a special arrangement in lieu of picking up the referral slip in person. In this, it appears that Arsenault was misinformed. Rankin did make such a request and, according to the union's own practice, there would be no *bona fide* reason for not complying with that request in the circumstances.

64. White testified that he wanted to have Rankin attend at the union hall to pick up a referral slip in order to generate leverage with Ryco to persuade the company to take another worker from the list as well. That explanation is not credible. The fax to Ryco does not suggest in any way that the referral slip for Rankin would be issued if the company took another ironworker from the list. Moreover, it is not plausible that, if that was White's real motivation, forcing Rankin to come to the hall would accomplish the purported objective. According to White, if Rankin had appeared at the union hall, he would have been issued the referral slip. That would not have resulted in the dispatch of an additional worker. What White appears to be suggesting is that, if Rankin attended at the hall, White could then telephone Ryco with a message along the lines of "Rankin is here, if you want him, you must take another from the list". There is no persuasive evidence to indicate why Rankin would have to leave the site in order to deliver that message. Further, White acknowledged that Arsenault's instructions were that Rankin was to be issued a slip even if Ryco would not take a worker from the list. The "leverage" argument is, in the Board's opinion, a red herring. This is not to suggest that the pairing of a name hire and list worker does not or should not occur. Indeed, where there is a 50:50 ratio, such pairing may well be the simplest means of maintaining the ratio. Boatner, the superintendent for Ryco at the time, testified that is generally what occurs in such circumstances. What the Board has concluded in this instance, however, is that the desire to persuade Ryco to take an additional worker from the list was not the motivation for insisting Rankin appear in person at the union hall to pick up a referral slip.

65. It is also worth noting that, in White's conversation with Rankin, White did not expressly assure Rankin that, if he came into the union hall, he would receive a referral slip. It must be remembered that, only the previous week, White had refused to approve a name hire referral of Rankin to State Contractors; Rankin had accepted White's explanation that the company had just laid off list workers. Rankin would be understandably agitated at the apparent refusal to approve the name hire for Ryco, especially following his discussion with Murphy that morning. The Board is satisfied that the conversation on March 9th did deal with the fine and dues arrears, particularly since White had raised this very matter with Arsenault prior to sending the fax. Power, as well, in his conversation with Rankin had adverted to the fine issue. It is unnecessary to determine White's true motivation for insisting that Rankin physically appear at the union hall in order to obtain a referral slip. It suffices for the Board to conclude, as it has, that the proffered reasons are not plausible.

66. The Board is satisfied that White's insistence on Rankin's physical attendance at the union hall and, indeed, White's entire handling of the Ryco referral request contravenes the duty of fair referral imposed by the Act. The Board concludes that the conduct was in bad faith and discriminatory within the meaning of the statute. In the Board's view, had the name hire not involved Rankin, the request would have been approved and the referral slip would have been faxed to the site or delivered by White on his next regular visit. White acknowledged that several request hires were approved for Ryco just a few weeks after the March 9 events. The Board is persuaded that the hostility and ill-will evident in the executive's treatment of Rankin and which resulted from Rankin's testimony against White in the criminal proceedings found expression in the manner in which the Ryco request to name hire was dealt with by the union. The Board is not suggesting that every member of the Arsenault slate was "out to get" Rankin, to use the vernacular. But a union can only act through its officers and other officials and, in this instance, the union's conduct clearly contravened the Act.

67. The Board is also satisfied that the union's actions were arbitrary. White sent a fax, the like of which had never before been seen, to a company which had a reputation as a fair employer, before confirming with the steward on site his ostensible belief (which the Board regards as unfounded) that the 50:50 ratio was violated. Even a cursory examination of the union records would have demonstrated that there was no excess of referrals over list workers. White exhibited, at best, an uncaring and indifferent attitude toward Rankin, whose employment was thereby placed in jeopardy, in the manner in which White responded to the name hire request. White did not bother to check with Murphy, the dispatcher on duty that week, with respect to the Ryco request until after he sent the fax. Had he done so, as he acknowledged to the Board, he would have learned that Rankin had called the hall that morning before starting work, that the acting steward had approved the Sunday start and that Murphy approved Rankin's working on the Monday pending resolution of the referral slip request. White's insistence that Rankin appear at the union hall was likewise arbitrary. The union's practice sensibly provided flexibility in delivery of the referral slip to the site (by a fellow worker, by fax or by the business agent) where the worker in question would have had to travel some distance to pick up the slip and at the cost of at least part of a day's pay. White was aware that Rankin lived close to the Bramalea site and about forty kilometers from the union hall. To deny Rankin's request to fax the slip to Ryco in the circumstances violated the duty of fair referral.

68. For the above reasons, the Board finds that the union contravened section 70 [formerly section 69] of the Act. The complainant is entitled to be compensated for the losses flowing from that violation. Some evidence was introduced as to when Rankin, had he received a referral slip, would otherwise have been laid off from Ryco. The Board indicated that its usual practice is not to hear evidence going to the quantum of damages until the Board has reached its determination on

the merits of the case. The Board also indicated that the parties generally are able to resolve the issue of damages between them. In this regard, while counsel for the complainant reserved his right to argue that compensation should include legal fees, without ruling on the issue at this juncture the Board would note that its uniform practice has not been to award costs as a head of damages.

69. The Board also considers it useful, in directing the parties to try and resolve the quantum issue, to comment on the fine assessed against Rankin. The Board noted earlier that the instant complaint bore some resemblance to the circumstances in *Ontario Hydro, supra*. The following excerpt from the decision sketches the Board's concerns:

15. In the case at hand the Board is not dealing with a question of improper referral, including failure to refer, to employment from the Local 506 hiring hall, rather it is dealing with the removal of the complainant's eligibility to be on the out-of-work list. The removal of his eligibility has resulted from internal procedures under the respondents' constitutions. While this Board has no specific authority under the Act to undertake any sort of watch-dog role over a union's internal processes under its constitution and by-laws, the Act clearly gives it authority to determine whether a union had breached its section 60a [now 70] duty. This in turn may require the Board to examine the union's conduct under its constitution and by-laws. While the Board is reluctant to invade the internal procedures of a trade union, it does so when it becomes essential to the exercise of the Board's authority and responsibility under the Act. See for example, the Board's decision in *George Zebrowski*, [1977] OLRB Rep. Mar. 143, in which the Board reviewed the procedures followed by the trade union under its "Constitution and Laws" in expelling the complainant from membership in the union, as a consequence of which the complainant was discharged from his employment. Another example of the Board finding it necessary to review a trade union's internal procedures is found in the Board's decision in *Rupert S. Martin*, [1977] OLRB Rep. Oct. 671. The Board in that case, in order to determine whether section 60a [now 70] of the Act had been breached, reviewed the internal decision-making process by which the respondent trade union decided not to refer the complainant to any employers who were seeking to employ members of the respondent through its hiring hall. In that same decision the Board dealt also with a question of whether one officer of the trade union had authority to make the decision not to refer the complainant to employment. In dealing with that issue, the Board acknowledged that it "... does not have the authority to police union constitutions and by-laws." and then stated:

"This is not to say, however, that where a union's constitution or by-laws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the constitution or by-laws, that those actions might not be a relevant factor in determining whether or not a breach of section 60a [now 70] has occurred."

In a like manner, the Board finds it essential in the circumstances of the instant case to review how the complainant was dealt with by Local 506 under its constitution and by-laws in order to determine whether there has been a breach of section 60a [now 70] of the Act.

16. The facts in this case as outlined above reveal that officers of Local 506 refused to accept the complainant's dues and to put him on the out-of-work list without advising him of the reasons for these actions. (It was only when the complaint triggered by the actions led to the hearing into this matter that the complainant learned of them.) Then Gargaro, upon learning that his actions were contrary to the constitution, filed the aforementioned charges against the complainant on grounds wholly unrelated to the reason advanced at the Board's hearing for the initial refusal to accept his dues and to put him on the out-of-work list. The charges were filed and proper notice of them and of the hearing into them was given to the complainant, all in accordance with the constitutions. The complainant declined the opportunity to attend the hearing and be heard.

17. While the officers of Local 506 may have had good reason for not filing charges against the complainant under its constitution as a result of the fraud issue and for waiting eight months after his alleged misconduct for which he was charged, none were given to the Board. In the

absence of any reasons or explanation for these circumstances, the Board is left to conclude that the two actions were related and had the single purpose of removing the complainant's right to be referred to employment through the Local 506 hiring hall. In other words, when Gargaro could not make the dues refusal stick, he looked around for some other way to achieve the same end and filed the charges referred to above. Had the Local 506 Trial Board not decided to rescind its decision with respect to the complainant's two earlier section 60 [now 69] complaints before this Board, that decision would have been the basis for finding a violation of section 71(2) [now 82(2)] of the Act. With that element of the charges against the complainant removed, there remains only the two "slander" charges. At the time the insults and accusations were directed at Gargaro by the complainant they could well be viewed as a proper cause of action under the constitution. With the passage of time, however, it seems to the Board that the injurious effect of the complainant's actions are lessened and eight months later one wonders what injury remains; in the Board's view it would be little and strengthens the conclusion that the real reason for the charges was to remove the complainant's good standing status. The Board therefore finds the filing of the charges after an eight months delay to be arbitrary and a bad faith exercise of the respondent's powers under their constitutions. Consequently, the Board finds that the respondents have acted arbitrarily and in bad faith in removing the complainant's eligibility for referral from the Local 506 hiring hall and therefore have acted in a manner that is contrary to the provisions of section 60a of the Act.

18. The Board, therefore orders and directs the respondents to forthwith rescind the remaining fines and restore the complainant's "good standing" status as a member of Local 506 and the international union and with it the same rights, duties and privileges which apply to any other member in good standing of Local 506 and the international union. Reinstatement is to be effective from the date when the complainant's good standing status was withdrawn.

70. The Board is not suggesting that the instant case is on all fours with *Ontario Hydro*. Local 721 apparently followed the proper procedures in Rankin's trial and conviction. The Board, however, is satisfied that the penalty imposed is so at variance with the norm that the bad faith is patent. The reduction in the level of fine, while dramatic, does not cure that bad faith as Rankin is still required to discharge that fine before dues may be accepted, under threat of suspension from union membership, as described above. While, for the reasons given in *Ontario Hydro, supra*, the Board does not interfere in internal trade union affairs, *per se*, the Board may well be required to do so where those decisions are in bad faith and directly impinge on the member's rights encompassed in the duty of fair referral. A trade union cannot do indirectly, through a bad faith decision to impose fines as part of its internal processes, what it cannot do directly, that is, exercise its hiring hall responsibilities in a manner which is arbitrary, discriminatory or in bad faith. Thus, Local 721 and the International cannot lawfully rely on the fine imposed on the complainant to visit negative employment consequences on Rankin including, for example, the refusal to accept union dues or the refusal to approve name hire requests or to dispatch Rankin from the list if he tenders the usual dues or is otherwise entitled to a name referral or dispatch.

71. The Board emphasizes that these comments are made in order to assist the parties in resolving all remaining issues between them without a hearing on the quantum of damages and in preventing further litigation over the status of the fine. The Board would add that, whatever the merits of Cole's WCB claim, Rankin expressed his regret at writing what he termed an "unwise" letter and stated he in no way intended to harm Cole. The Board regards those sentiments and the Board's comments as useful to the parties in resolving the quantum issue and finally putting the entire matter behind them.

72. For the foregoing reasons, the Board finds that the respondent contravened section 70 [formerly section 69] of the Act. The respondent is directed to compensate the complainant for the losses flowing from that breach. Board Officer James Bowman is appointed to meet with the parties to assist them in attempting to resolve the compensation issue. The Board retains jurisdiction

to deal with any matters arising out of the interpretation or implementation of this decision, including compensation, should the parties be unable to reach agreement.

3662-91-R Ontario Public Service Employees Union, Applicant v. Royal Ottawa Health Care Group/Services de Sante Royal Ottawa, Responding Party v. Group of Employees, Objectors.

Bargaining Unit - Certification - Hospital operating two main sites and various remote clinics - Union seeking to represent unit of paramedical employees at main hospital site and at satellite clinics, but excluding employees at second main site from proposed bargaining unit - Other hospital bargaining units encompassing all sites - Union presenting no evidence of difficulty in organizing employer - Hospital running all sites in integrated fashion - Board concluding that unit applied for not appropriate - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *Chris Dassios*, *Ed Ogibowski* and *Ovette Soriuno* for the applicant; *Carole Piette* for the responding party; no one appearing for the objectors.

DECISION OF ROBERT HERMAN, VICE-CHAIR, AND BOARD MEMBER, W. H. WIGHTMAN; July 30, 1993

1. This is an application for certification.
2. A Board Officer was appointed to inquire into certain matters and report back to the Board. The parties have fully participated in the Board Officer's inquiry, and received a copy of the Board Officer's Report. A hearing was convened to entertain the submissions of the parties.
3. The sole issue before the Board, at this stage of the proceeding, is to determine whether the bargaining unit requested by the applicant is appropriate.
4. The applicant, OPSEU, has applied for a paramedical bargaining unit, described more or less in the standard terms used by the Board in describing such bargaining units (there are some disputes over the specific description, but they are not germane to the issue dealt with here.) Although the applicant has applied for the standard paramedical bargaining unit, it has done so only with respect to paramedical employees at the main hospital building (referred to as the "Royal Ottawa Hospital"), and at all geographically remote satellite clinics run by the employer, but excluding the second main site, the Rehabilitation Centre. In response, the employer takes the position that the bargaining unit ought to include all sites of the hospital in the municipality, including the Rehabilitation Centre. If the Board determines that the unit claimed by the applicant is not appropriate, it is agreed that the application would be dismissible.
5. The employer, the Royal Ottawa Health Care Group ("the hospital"), provides hospital services for the Eastern Ontario area. It does so primarily through two teaching institutions, the Royal Ottawa Hospital and the Rehabilitation Centre, both of which are affiliated with the University of Ottawa. Generally speaking, the Royal Ottawa Hospital is dedicated to the provision of psychiatric services, and the Rehabilitation Centre to the provision of physical medicine and rehabili-

tation services. The two institutions are both located in the City of Ottawa, approximately nine miles apart.

6. Prior to early 1981, the Rehabilitation Centre did not exist as a separate building or institution. The Royal Ottawa Hospital facility was the sole facility, and rehabilitation and physical medicine services were provided out of that one location. In 1981, services were split off from the the Royal Ottawa Hospital, and began to be provided at the Rehabilitation Centre site. Both the Royal Ottawa Hospital and the Rehabilitation Centre remain facilities operated and managed by the Royal Ottawa Health Care Group.

7. There are numerous other facilities, also geographically distinct from the Royal Ottawa Hospital, through which the employer provides health care services to the community. These include the Meadowcreek Addictions Centre, the Family Court Clinic, the Early Intervention Program, the Laurentian Unit, and the St. Bonaventure Unit. As noted, the parties agree that the bargaining unit ought to include these satellite clinics, and disagree only on whether the unit must also include the Rehabilitation Centre. At the time this application was filed, there were approximately 113 paramedical employees at the Royal Ottawa Hospital, 131 at the Rehabilitation Centre, 17 at the Meadowcreek Clinic, and each of the other satellite clinics had from one to three paramedical employees.

8. All institutions are administered and managed under one administrative corporate structure. There are single departments of Human Resources, Finance, Public Affairs, and Corporate Planning and Information Systems. These departments set and administer overall policy, applicable to all geographical locations, including the Rehabilitation Centre. However, clinical control is at the local level, at least insofar as the Royal Ottawa Hospital and the Rehabilitation Centre are concerned. The paramedical employees at each site report to the Directors of their respective clinical services located and based at the particular site. There are no obligations to report to clinical supervisors located at the other site. For example, each of the two main sites has its own supervisors or Directors with respect to Nursing, Psychology, Social Work, and Occupational Therapy. Certain specialties or disciplines are provided only at the Rehabilitation Centre (for example, Physiotherapy, Vocational Therapy, Prosthetics and Orthotics, and Rehabilitation Engineering), and the heads of these services are accordingly located at the Rehabilitation Centre. Within the clinical areas that are provided at each site, practice and procedure policies are set at the local level, to be followed by the paramedics working at their respective locations. Overall medical policy remains set at the corporate level.

9. With respect to labour relations and day-to-day employment relations, although human resources policy is corporately set and managed by the Human Resources Department of the employer, most day-to-day employment matters are dealt with at the local level, through the human resources personnel that are based at each of the two main sites. If employees have complaints, if discipline is to be imposed, or if other employment relations matters of this nature are to be dealt with, it is the supervisor or director at the Royal Ottawa Hospital or the Rehabilitation Centre, as the case may be, who is initially responsible. Thus, when grievances are filed, local human resources personnel initially deal with them, but only at steps one and two of the grievance procedure. From the third step of the grievance procedure on, all grievances are dealt with at the corporate level. Corporate personnel handle grievances regardless of the site at which the grievance arose.

10. With respect to hiring, the decision as to whether to fill a particular vacant position is made corporately, taking into account corporate policies and overall budget concerns. Once the decision to hire is made, it is implemented at the local or site specific level, with the local human

resources and clinical personnel determining the specific qualifications of the job, arranging for and conducting the interviews, and ultimately choosing the successful candidate. Although there was some dispute in the evidence on the point, we are satisfied that the policy is to post job openings at both sites, and in fact this has generally been done.

11. When employees are terminated, the initial investigation is conducted locally and a recommendation is made by the human resources personnel based at the particular facility. The recommendation then goes to the corporate Human Resources Department, which advises on the termination, drafts any severance arrangements, and in turn sees that any recommendation is reviewed by the corporate Director of Finance.

12. Negotiations for both existing bargaining units and the unorganized employees, including the paramedics, are conducted at the corporate level. There is a central payroll. The paramedical employees have the same terms and conditions of employment and classifications, regardless of location (although, as noted, some services are provided at only one location, so that some job classifications have incumbents at only one location).

13. Since clinical services provided by the Royal Ottawa Hospital and the Rehabilitation Centre focus on different priorities, with the former focusing on psychiatric and the latter on physical or rehabilitative problems, there are naturally differences in emphasis and particular skills between the paramedics based at the two sites. Rehabilitation Centre paramedics focus more on assessment and treatment of physical problems, and work more with new technology. Paramedical employees working at the Royal Ottawa Hospital are better equipped to work in the psychiatric or psychological fields. There is some training needed when paramedics move from one location to the other, regardless of the direction, and it appears that because of this different emphasis, movement between the facilities is not particularly common. As noted, job openings are posted in both locations, and employees have been successful candidates for jobs at the other location. The transfers, as such, have been very few, since employees have not been assigned from one to the other, but rather have applied for posted vacancies, and been the successful candidates.

14. Some paramedical employees work regularly at both sites, although officially connected to one site only for employment and clinical supervision purposes. For example, the person providing back care education and injury prevention works approximately two days a week at the Royal Ottawa Hospital and the remaining time at the Rehabilitation Centre, although based only at the Rehabilitation Centre site. Similarly, there are physiotherapists working at the Rehabilitation Centre who spend approximately one fifth of their regular working time providing services at the Royal Ottawa Hospital. Pharmacists work on an on-call rotation system which occasionally requires that they make calls at the other facility. They also fill in at the other facility for vacation and sick leave absences.

15. The satellite clinics are more closely integrated with the Royal Ottawa Hospital than the Rehabilitation Centre. The clinics are under the direct supervision of the Royal Ottawa Hospital for clinical reporting and delivery of services purposes. Additional factors also speak to greater integration. The Drug and Alcohol Program satellite seems to be simply one geographical component of the unified program provided out of and based at the Royal Ottawa Hospital. The staff at the Family Court Clinic and the Early Intervention Program both regularly attend meetings in their respective disciplines at the Royal Ottawa Hospital. The staff at the Laurentian and St. Bonaventure units maintain their offices at the Royal Ottawa Hospital site.

16. At the time of the application, there were 6 bargaining units at the hospital, five of which encompassed all sites, including the satellite clinics and the Rehabilitation Centre. CUPE represents service employees in both full-time and part-time units, and ONA similarly represents

nurses in the two units. The fifth all-site bargaining unit is a relatively small unit of stationery engineers currently represented by the Independent Canadian Transit Union. With the exception of the CUPE part-time service unit, the four other all-site bargaining units existed at the Royal Ottawa Hospital prior to the separation of sites in 1981. When the separation occurred, each of the four bargaining units continued as it had, covering all of the existing geographical sites. The exception, the CUPE part-time unit, which was organized in 1983 after the separation occurred, mirrors the pre-existing full-time bargaining unit. There is also a CUPE unit, representing child care workers, but only at the Royal Ottawa Hospital site, the only location at which they work.

17. Based on these facts, the question for the Board is whether the bargaining unit requested by the applicant is an appropriate bargaining unit. The applicant need not establish that the unit it seeks is the most appropriate or more appropriate than others, only that it is *an* appropriate unit. The approach to be taken by the Board in answering this question is described and set out in *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, where the Board put the question this way (at paragraph 23 therein): Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. Here, the hospital argues that the unit sought by OPSEU would likely cause serious labour relations problems.

18. In more fully describing the approach it took to defining or describing an “appropriate bargaining unit”, the Board in that case wrote as follows:

...

17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the “appropriate bargaining unit”? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board’s control, the discretion to frame the “appropriate” bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer’s business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer’s administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer’s administrative structures; the geographic circumstances; the employees’ functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

18. Some of the collective bargaining consequences of the bargaining unit determination were canvassed in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481. In that case, the applicant

was seeking to represent a "craft" unit of about 100 certified electricians who were part of a maintenance department of 800 employees and an industrial work force of 2,800, all of whom were unorganized. The Board made the following general observations about the potential significance of a bargaining unit determination:

50. We may begin by observing that the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary works stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patchwork quilt of bargaining units is a recipe for industrial unrest -if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

The comments in *Kidd Creek* illustrate some of the problems which could arguably rise in some settings from an unduly fragmented bargaining structure - even if the group of employees who sought to organize themselves did indeed share a distinct or identifiable community of interest.

19. Some of the same concerns underlie the Board's analysis in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, which involved an attempt by two unions to organize differently described but overlapping units of paramedical employees. The initial problem was the description of the appropriate bargaining unit. The Board recognized that in the special environment of a public hospital pharmacists, physiotherapists, social workers, etc. all had an arguably distinct

identity stemming from such factors as their specialized training, outside professional or quasi-professional associations, and particular departmental focus. In this sense, each sub-group and each department could claim a distinct community of interest. However, the Board made it clear that this did not mean that each of these groupings, would constitute a separate bargaining unit for collective bargaining purposes. Such balkanization of bargaining would create serious administrative problems for the Hospital. Nor, for reasons set out at length, was the Board persuaded that technical, paramedical, paraprofessional and professional employees could, or should be distinguished for collective bargaining purposes, even though there were obviously important distinctions between the various sub-groupings based upon their level of education, responsibilities, degree of independence, and how far they had travelled on the "road to professionalization". The Board was of the view that for collective bargaining purposes, they could all comfortably co-exist within one paramedical bargaining unit.

20. In *Kidd Creek* and (*Stratford General Hospital* to a lesser extent), it was suggested that an inappropriate or unduly fragmented bargaining structure could contribute to subsequent labour-management problems, tension within and between bargaining units, and an escalation of industrial conflict. Such outcomes are undesirable. If these problems can be avoided by more careful attention to the determination of the bargaining unit "at the front end", without prejudicing other collective bargaining or statutory objectives, then that attention is obviously warranted. On the other hand, if the potential for collective bargaining difficulties is less obvious or serious, or if the possible problems are less certainly connected with one bargaining unit definition as opposed to another, or if similar problems are likely to arise wherever the line is drawn, then the precise perimeter of the bargaining unit may be less important from a policy point of view.

19. It is worth setting out these comments here. This approach has been generally followed by the Board, and guided the community, in the years since that decision. It has not been easy for the Board, or for the parties in the community, to determine with any degree of certainty what might constitute a serious labour relations problem for a particular employer. One recurring theme, however, has been fragmentation.

20. In *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB rep. Feb. 371, the Board wrote about fragmentation concerns at some length:

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13. The concept of a bargaining unit performs two quite distinct functions in labour relations law. In order to be certified, a trade union must enjoy the support of a majority of employees in a bargaining unit. The unit serves as an electoral district in this setting. After a union is certified, the bargaining unit found by the Board to be appropriate strongly influences the conduct of collective bargaining. Although the parties sometimes vary this unit description, it is frequently simply reproduced in the recognition clause in a collective agreement.

14. A trade union may experience insurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance*

Corporation of British Columbia, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitably spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.

18. But the community of interest among employees may point towards either a broadly based structure or separate bargaining units. In this context, the word interest, in the phrase community of interest, refers to the bargaining objectives of the employees in question. The most important determinate of those objectives is the work performed. Skills and terms and conditions of employment are also relevant, but these factors are largely derived from the nature of work. In deciding whether to include a population of employees in one bargaining unit or to divide them into separate units, the Board has recognized that within a single unit there is a tendency to compress existing differentials in wages, benefits and other work rules. People who perform the same, or substantially similar, work are likely to have similar aspirations concerning terms and conditions of employment. And a strong argument can be made that they ought to be treated in the same way. Equal treatment is fostered by including all such employees in one bargaining unit. Conversely, employees whose jobs differ radically from the work of their fellow employees have a legitimate claim to different terms and conditions of employment. If they are pressed into one large unit, the logic of collective bargaining is bound to erode existing differentials. Those on the short end of the stick not only have a compelling grievance but also may cause disruption. And an employer may experience difficulty in recruiting for jobs in which the terms and conditions of employment are less attractive than elsewhere. Separate bargaining units may alleviate these problems. However, not all differences between jobs are this fundamental. As a single collective agreement permits of some variation in terms and conditions of employment, it can embrace employees whose jobs differ to some degree, without generating undue dissatisfaction. [sic] When entertaining an application by a special interest group for a separate bargaining unit, the Board must also bear in mind that these employees would not achieve complete autonomy by winning a separate unit, because it could not be insulated from the forces of pattern bargaining exerted by neighbouring units. The challenge is to decide what differences between jobs are of sufficient magnitude to justify the creation of separate bargaining units, with their attendant disadvantages. In other words, a balance must be struck between the competing considerations that bear upon the creation of a viable bargaining structure.

19. The design of bargaining units becomes even more complex when the focus of attention is expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the

Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited, supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been “hard pressed” not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

21. The applicant, however, asserts that the Board’s approach ought to be different now, in light of the recent amendments to the *Labour Relations Act*. The applicant relies upon section 2.1.1., arguing that the purpose expressed therein ought to lead the Board to find fragmented units to be appropriate, even if it might not have found them to be appropriate prior to the amendments. Section 2.1.1 reads as follows:

2.1 The following are the purposes of this Act.

1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.

22. But section 2.1 must be read in its entirety, along with other new provisions, setting out other purposes of the new Act. The balance of section 2.1 reads as follows:

2.1 The following are the purposes of this Act.

• • •

2. To encourage the process of collective bargaining so as to enhance,

- (i) the ability of employees to negotiate terms and conditions of employment with their employer.
- (ii) the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and
- (iii) increased employee participation in the workplace.

3. To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.

4. To provide for effective, fair and expeditious methods of dispute resolution.

As can be seen, one of the stated purposes is to promote harmonious labour relations and industrial stability.

23. Further, the “purpose” provisions must be considered in context, given the specific provisions that deal with the determination of the appropriate bargaining unit. Section 6 (1) remains unchanged, and the Board is still required thereby to determine the unit of employees that is appropriate for collective bargaining. This obligation and our discretion thereunder continue to exist. If the amendments suggest any change in how that discretion is exercised, they appear to

reflect the legislative intention that larger more comprehensive bargaining units are to be preferred as a matter of labour relations policy. Pursuant to section 6 (2.1), a bargaining unit consisting of full-time and part-time employees shall be deemed to be appropriate (subject to saving provisions found elsewhere in section 6). And, pursuant to section 7 (1) (another new section), in specified circumstances the Board may now combine two or more bargaining units consisting of employees of an employer into a single bargaining unit. In light of these new legislative provisions and the continuation of the Board's discretion expressed in terms identical to those that existed prior to the amendments, we have some difficulty with the proposition that under the amended *Labour Relations Act* we ought to exercise our discretion to find as appropriate a bargaining unit we would not previously have found to be appropriate. In our view, fragmentation of an employer's work force remains a concern and remains one of the predominant reasons for concluding that a bargaining unit requested by an applicant would likely cause serious labour relations problems for an employer.

24. At the same time, concern over the problems caused by fragmentation must be balanced against the equally valid concern that the application of the Board's general approach to the appropriateness of bargaining units may unreasonably impede or prevent unions from organizing in a particular sector, industry, or context. In some settings, it has historically been true that an insistence on more comprehensive bargaining units has proved to be too great an obstacle to the ability of unions to organize employees. For example, in *K-Mart Canada Limited*, discussed above in paragraph 20, in paragraph 19 in the quotation set out therein, the Board took into account the bargaining pattern in the industry and the difficulties in organizing in the particular sector of the retail industry. Because of these problems, the Board found as appropriate a single store within the municipality, notwithstanding its general policy of certifying on a "municipality wide" basis, and notwithstanding lingering concerns about the potential labour relations problems of certifying one store. The Board did not want its determination of the appropriate bargaining unit to increase the existing organizing difficulties. And there are a number of other contexts in which the Board has applied a "single branch" approach to determining the appropriate bargaining unit: see, for example, the discussion in *Famous Players Inc.*, [1990] OLRB Rep. May 509.

25. In *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226, the Board more fully described the balancing of interests between fragmentation and organizing obstacles as follows:

14. The case law recognizes that the Board must determine the appropriate bargaining unit, in accordance with section 6(1) of the Act, in the circumstances of each application but that more than one unit may well be "appropriate" in respect of a single employer: *The Board of Education for the City of Toronto*, *supra*; *Parnell Foods*, *supra*; *The Hospital for Sick Children*, *supra*; *National Trust*, *supra*. In considering the various possible bargaining unit configurations, however, the Board must be sensitive to the impact of that determination on the access by employees to self-organization: *The Board of Education for the City of Toronto*, *supra*; *Tip Top Tailors*, *supra*; *Canada Trustco*, *supra*. This sensitivity led the Board to acknowledge the appropriateness of bargaining units consisting of single plants within a municipality to facilitate collective bargaining in the retail industry in particular: *K Mart Canada*, *supra*; see also *Canada Trustco*, *supra*.

15. Further, the Board recognizes that a multiplicity of bargaining units generally has adverse consequences for the future bargaining relationship of the union and employer, such as, increasing the likelihood of strikes, increased complexity in administering several collective agreements, the triggering of jurisdictional disputes and employee "enclaves" coextensive with each bargaining unit: *Board of Governors of Ryerson*, *supra*; *The Globe and Mail Limited*, *supra*. Conversely, broader based units enhance administrative efficiency, employees' lateral mobility and industrial stability and provide a common framework for employment conditions: *Insurance Corporation of British Columbia*, *supra*; *Ontario Hydro*, *supra*. Where the more comprehensive unit would not operate to seriously impede or delay employee access to collective bar-

gaining, the Board has favoured the broader grouping: *Board of Governors of Ryerson, supra*; *Stratford General Hospital, supra*. In short, the Board prefers the most comprehensive unit that is viable for labour relations purposes in the context of a policy of facilitating employee access to collective bargaining: *The Corporation of the City of Thunder Bay, supra*.

26. The applicant does rely, in part, on organizing difficulties as justifying its bargaining unit. It points to the fact that the paramedical employees have remained unorganized throughout the history of R.O.H.C.G. It noted that other bargaining units at the hospital came into existence from the early 1970's on, and the last certification was in 1983. In these circumstances, the applicant asserts that there has been an impediment to organizing paramedical employees of this employer. But this argument is not persuasive here. If a sector or context is highly organized, as this one is, we are not prepared to draw an inference of difficulties with access generally. Whether or not the Board ought to find a unit to be appropriate on the basis that there have been organizing difficulties experienced with the particular employer in a sector that is otherwise significantly organized, we need not decide here, as there is no evidence of such difficulties at this particular institution. Accordingly, we do not conclude on the facts that organizing obstacles are a meaningful factor in the case at hand.

27. Returning to the facts, the parties are agreed that the satellite clinics are to be included in the bargaining unit. Notwithstanding that many of the clinics are also a significant distance away, the satellites are meaningfully integrated with the operation of the Royal Ottawa Hospital, and the parties' agreement effectively acknowledges that high degree of integration.

28. Should the Rehabilitation Centre be included? As the applicant submitted, it is not like a fully integrated floor or department of the hospital. There are meaningful differences between a rehabilitation program offered within the confines of a single hospital facility, as part of a multi-disciplinary service provided by that hospital, and the rehabilitation and physical medicine services offered here, at and out of the Rehabilitation Centre site. The Rehabilitation Centre serves different populations and has a different patient group. The source of most of its work is not from other parts of the hospital, but is primarily from other hospitals in its geographical vicinity or from direct referrals from the Ministry of Community and Social Services. The Rehabilitation Centre has its own human resources personnel on site, who are primarily responsible for most day-to-day employment related matters.

29. Neither however is the Rehabilitation Centre operated as a separate hospital. For many significant purposes, the administration and operation of this employer is on a unified corporate basis. Policies on financial matters are determined and managed at the corporate level, applicable to all sites. Some staff, albeit few in number, work regularly at both sites. When job vacancies occur paramedics at both sites are notified and can apply. The classifications for the paramedical employees are similar, though not identical, at both sites. Many of the aspects of labour relations are managed at the corporate level. The terms and conditions of employment for the paramedics are set at the corporate level, and are the same regardless of site. The decision whether to fill a vacancy or create a new job or whether to discharge an employee is corporately made. Negotiations for new collective agreements or contracts for the unorganized staff are conducted on an institutional basis. Grievances and arbitrations are dealt with by the corporate human resources personnel.

30. The pre-existing bargaining structure is essentially institution-wide. Only one of the six bargaining units covers employees on a location-specific basis, but for that bargaining unit, the child care workers, the affected employees only work at one location. Even if described on an

institutional basis, the unit would have no interaction outside the one site. All other units encompass all sites.

31. Even though the focus of assessment and treatment differs, the paramedic employees at both main sites utilize similar skills. Given this difference, paramedics would likely need additional training when they switch sites. However, this is typically so in the health care sector whenever professionals in one department or service transfer to another. And the nature of the paramedical bargaining unit acknowledges the grouping of professionals with distinct skills and training. This is as diverse a bargaining unit, with respect to the skills and abilities of its employees, as can be found in the health care field, and the existing differences between those categories of employees in this bargaining unit, or between the paramedical employees at the two sites, do not justify separate bargaining units.

32. In a practical sense, the employer runs the Royal Ottawa Hospital, the clinics and the Rehabilitation Centre in an integrated fashion. The historical development of the hospital and its metamorphosis from a single facility to new locations and out-reach clinics suggests a broader unit, acknowledging its organizational fluidity and pre-existing bargaining structures. There will likely be significant labour relations problems for both the employer and the paramedic employees should the unit sought by the applicant be found to be appropriate. There will no doubt be increased costs to the employer, both the costs of negotiating and administering a collective agreement with respect to an extra bargaining unit, and the costs in negotiating a second pay equity plan, both sets of additional costs incurred for the same classifications of employees.

33. A multiplicity of bargaining units will not have consequences in a strike context, as the employees here are precluded from work stoppages, through the provisions of the *Hospital Labour Disputes Arbitration Act*. But other problems may well result. Seniority enclaves would likely be created in the different bargaining units, with restrictions on transfers between bargaining units. There will likely develop significant impediments to movement of employees between the two locations. In addition to restricting the job opportunities for paramedical employees within the same institution, there may well develop work assignment disputes, revolving around which geographical group of paramedics ought to be entitled to perform certain work. The employer may be forced to restructure the way in which its paramedical employees perform their duties, to ensure that no employees work regularly at both sites. Out of an integrated operation will develop a multi-site institution where, practically speaking, the two main sites must be run on a largely independent basis, but only with respect to paramedical employees, since the existing bargaining units are hospital-wide. This structure would make little sense. These sorts of potential problems constitute "serious labour relations" problems within the meaning of that phrase in the *Hospital for Sick Children, supra*. And see, for example, *Hornco Plastics Inc.*, OLRB [1993] Rep. May 411.

34. Balanced against these potential problems is the assertion (but no evidence) by the applicant that there has been difficulty in organizing the employer, in the context of a sector in which organizing has not been unduly difficult. We do not find that this factor here leads us to find the unit sought to be appropriate, and we conclude that it is not.

35. This application is accordingly dismissed.

DECISION OF BOARD MEMBER PAT V. GRASSO; July 30, 1993

1. With respect, I am unable to agree with the conclusion reached by the majority.

2. The main question that the Board is asked to decide is whether the unit proposed by the applicant is a viable unit that will not cause serious labour relations problems for the employer.

3. The problems raised by the employer to the union's proposed unit are not so serious, in my view, as to create an obstacle to an otherwise appropriate bargaining unit. Each of these units will survive without the other and are not dependant on one another for their existence.

4. The points raised in paragraph 29 and 31 of the majority decision regarding policies on financial matters; posting of job vacancies at both sites; classifications being the same at both sites; labour relations managed at corporate level; terms and conditions of employment being the same at both sites and other such meaningless items are not significant enough to cause any serious labour relations problems.

5. Granting certification for the unit asked for may very well cause the employer some administrative inconvenience but that alone does not constitute a serious labour relations problem that should cause the Board to deny the applicant the bargaining unit it desires. The union is entitled to be granted an appropriate bargaining unit. The Act does not require it to apply for the most appropriate unit.

6. As a result, I would have granted the applicant's proposed bargaining unit thereby facilitating access to collective bargaining rather than placing stumbling blocks in the path of employees who wish to join a union and participate in the collective bargaining process.

0583-93-U United Food and Commercial Workers' International Union, Local 1000A, Applicant v. Sobeys Inc., Responding Party

Interference in Trade Unions - Right of Access - Unfair Labour Practice - Employer directing employees not to engage in union activity or discussion of union related issues on company premises - Board rejecting employer's argument that section 11.1 of the Act altered the law regarding the right of employees to engage in union activity in the workplace - Prohibition of union activity and discussion of union related issues violating section 65 and 67 and declared to be of no effect

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *M. Hart*, *K. Corporon*, *L. Taylor*, *C. Taylor* and *J. Lease* for the applicant; *K. A. McCaskill* and *D. W. Fearon* for the responding party.

DECISION OF THE BOARD; July 13, 1993

1. This is a section 91 complaint wherein the applicant (the "union") alleges that the responding party (the "employer" or "Sobeys") has violated sections 3, 65, 67 and 71 of the *Labour Relations Act* (the "Act").

2. At the outset of the hearing the parties advised the panel that many of the issues raised by the complaint had been settled subject to their appropriate implementation. They therefore jointly requested that those matters be adjourned *sine die*. The panel so adjourned those aspects of the complaint. The remaining issue concerned allegations arising in respect of paragraphs 4 and 5 of Schedule "B" of the complaint concerning a letter issued to two employees by the employer. At the conclusion of the hearing, the panel ruled orally that the employer had violated sections 65 and 67 of the Act by including paragraph 4 in the letters and we declared that paragraph to be of no

effect. The panel reserved on any further issue of remedy and advised the parties that our reasons would follow. We now provide those reasons.

3. As a preliminary matter, the employer objected to the matter having been scheduled on an expedited basis. The applicant applied under section 92.2 for an expedited hearing and asserted in its pleadings that it has engaged and continues to engage in organizing activities at the employer's Stratford store. The employer took the position that it was incumbent on the applicant to prove that organizing activities were in fact being carried on in order to allow the applicant access to an expedited hearing. It was also concerned that it had not been consulted concerning the setting of the date for hearing. The applicant was prepared to proceed first and also offered to the responding party a "will-say" outline of the evidence to be tendered. The panel ruled the case would proceed. We noted that the scheduling of hearings is a matter within the Board's general discretion even absent any specific provision in section 92.2. The Board has rarely consulted the parties in setting the first day of hearing and in the most recent past, due to shrinking resources and an expanding jurisdiction, has advised the community that the Board has even less flexibility to accommodate counsels' schedule and the convenience of parties. There were no circumstances present which would warrant an adjournment.

4. The relevant facts are fairly straightforward. To put this matter in context we review certain aspects of the parties' relationship leading up to the the letter in issue. These facts were agreed to between the parties in their pleadings.

5. On May 8, 1991 a complaint was filed pursuant to section 91 of the Act alleging that Sobeys was in breach of sections 3, 65, 67, and 71 of the Act in firing, demoting, and disciplining a number of employees at its Stratford grocery store. Following nine days of hearing a decision of the Board dated September 16, 1992 was released. Pursuant to an order of the Board, the employer was directed to offer reinstatement to two complainants, Jackie Lease and Chris Taylor, employees of Sobeys. Following the release of that decision the employer applied to the Ontario Court, General Division, for a stay. The decision of that court was released on December 22, 1992 and an interim order issued directing the stay of the implementation of the Board's decision. An application by the applicant to the Ontario Court (General Division) to set aside that stay was granted on February 9, 1993. Following the release of that decision, the responding party agreed to reinstate the two individuals and arrangements were made for their return to work.

6. On her arrival at work on March 31, 1993, Ms. Taylor was presented with a letter by Mike Layton, the store manager for Sobeys in Stratford. That letter, dated March 29, 1993 is described by the employer as setting out "some important points concerning your return to work at the Stratford store". Paragraph 4 of the letter which is in issue in this complaint states:

There is to be no union activity or discussion of union related issues on company premises.

7. Ms. Lease reported for work on April 5, 1993. On her arrival, Mr. Layton presented her with a letter identical in content to the one given to Ms. Taylor. Paragraph 4 of that letter contains the same direction as quoted above. Employees at the Sobeys' Stratford store are entitled to two fifteen minute paid breaks during each eight hour shift and a one hour unpaid lunch break.

8. The additional *viva voce* evidence simply established that upon their return to work the two employees were asked questions such as, "what happened?" and were only able to say that they could not talk about it, and that that inability contributed, in essence, to anxiety on the part of employees concerning the union's activity in the workplace. We note that this latter conclusion is somewhat speculative on the part of the two employees. However we do not believe it to be an unreasonable inference to draw from the circumstances that this response on the part of the two

employees would send a message to their coworkers that discussing union related issues would draw a negative reaction from their employer. No evidence was called by the employer.

9. The union asserted that the inclusion of paragraph 4 in the letter violates the Act and refers to the Board's caselaw that has developed under section 72 of the Act (colloquially referred to as cases regarding no-solicitation rules). It argued that the employer's conduct must also be seen in the context that this restriction was placed on two employees who were engaged in lawful union activity and who were returning to work after a lengthy absence pursuant to an earlier Board order and a finding that the employer had violated the Act. The union referred us to the following cases: *T. Eaton Company Limited*, (1985) OLRB Rep. June 941; *The Adams Mine, Cliffs of Canada Ltd., Manager* (1982) OLRB Dec. 1767; *Time Air Inc. and Canadian Air Line Pilots Association*, (1989) 3 CLRBR (2d) 233; *Re Cadillac Fairview Corp. Ltd. et al and Retail, Wholesale and Department Store Union et al*, (1989) 71 O.R. (2d) 206; and *Royal Homes Limited*, [1992] OLRB Rep. Feb. 199.

10. In response, the employer accepted that the *Adams Mine* case, *supra*, appropriately characterized the state of the law until January 1, 1993. The employer relied on sub-section 11.1(2) of the Act and argued that it altered the law, at least with respect to property such as shopping centres or malls where its store is situate. The employer asserted that sub-section 11.1(2) now meant that employees and persons acting on behalf of a trade union had a right to be present on private property but that right was limited by excluding the workplace itself. The essence of the employer's position was that as of January 1, 1993, no union organizing activity could take place at any time in the workplace by employees or others. The employer drew a distinction between union organizing activity and other discussion. In response to the applicant's concern that these two employees have been unable to discuss the earlier Board proceedings and their results, counsel for the employer asserted (in the absence of any evidence) that it had not been the employer's intention to prevent employees from discussing that case.

11. The panel rejected the employer's interpretation of sub-section 11.1(2). It is useful to first quote from *Adams Mine*, *supra*, generally considered as appropriately setting out the considerations underlying the balancing of interests involved:

20. An employer who nevertheless enforces a no-solicitation rule that has the effect of preventing employees from, for example, soliciting union membership on company premises during non-working time will be found by this Board to have intended this result and therefore to have acted contrary to section 66(c) [now section 67(c)] and section 64 [now section 65] of the Act unless the employer can establish by cogent evidence that its purpose was to preserve property, to prevent serious disturbance, ensure productivity or preserve plant safety. See *Audio Transformer Company Limited*, *supra*, page 1003. Where the latter is established, union solicitation that is seriously disruptive of managerial interests can be regulated by an employer even though the incidental [effect] is to constrain protected activity. In such circumstances, the Board construes the employer's actions as aimed solely at the preservation of its bona fide right to manage.

21. It is to be noted that the statute provides a more specific and different balance between an employer's property interest and the right of non-employees to solicit union membership from employees on company property. In this regard, section 11 provides that where employees of an employer reside on the property of the employer, the employer when directed by the Board, shall allow a representative of a trade union access to the property for the purpose of attempting to persuade the employees to join the trade union. Therefore, the statute acknowledges the right of an employer to raise his property rights against strangers to the employment relationship even though the strangers are union organizers and their involvement on company property during non-working time would not interfere with any bona fide management interest. The attempt here is to accommodate the right of property and the right to organize "with as little destruction of one as is consistent with the maintenance of the other". See *N.L.R.B. v. Babcock*

and *Wilcox Company* (1956), 38 LRRM 2001 at 2004. If employees have the right to carry on organizing activity on company premises, it does not seem an unfair balance of interest to limit strangers to the usual channels of communication with those employees off company premises. See also the approach of the Supreme Court of Canada in dealing with competing proprietary and collective bargaining claims between strangers, in a case involving an employer's landlord and striking employees in *Harrison and Carswell* 75 CLLC ¶14,8286 (SCC).

22. From this analysis we arrive at the following general principles:

- (a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;
- (b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer's property are valid in the absence of an application for a direction pursuant to section 11.

12. The employer argued that section 11.1(2) alters the law regarding the expression of an employee's right to engage in union activity in the workplace. The employer stated that it believed that this section was passed as a result of events arising in connection with an organizing campaign at an Eatons store in Toronto, but asserted that the language used created a different effect from what might have been intended. It relies on the sentence underlined below in section 11.1(2).

13. Section 11.1 as a whole reads as follows:

Application

11.1-(1) This section applies with respect to premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals.

Right of access re organizing

(2) Employees and persons acting on behalf of a trade union have the right to be present on premises described in subsection (1) for the purpose of attempting to persuade employees to join a trade union. *Attempts to persuade the employees may be made only at or near but outside the entrances and exits to the employees' workplace.*

Right of access re picketing

(3) During a lock-out or lawful strike, individuals have the right to be present on premises described in subsection (1) for the purpose of picketing, in connection with the lock-out or strike, the operations of an employer or a person acting on behalf of an employer. The picketing may occur only at or near but outside the entrances and exits to the operations.

Prohibition

(4) No person shall interfere with the exercise of a right described in subsection (2) or (3).

Restrictions on right of access

(5) On application, the Board may impose such restrictions on the exercise of a right described in subsection (2) or (3) as it considers appropriate in order to prevent the undue disruption of the operations of the applicant.

Jurisdiction

(6) An application respecting the exercise or alleged exercise of a right described in subsection (2) or (3) may be made only to the Board and no action or proceeding otherwise lies at law.

(7) A party to an order made under subsection (5) may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

Conflict

(8) In the event of a conflict between a right described in subsection (2) or (3) and other rights established at common law or under the *Trespass to Property Act*, the right described in those subsections prevails.

[emphasis added]

14. Sub-section 11.1(2) makes reference to “attempts to persuade the employees” and read in conjunction with the title of the sub-section is clearly intended to address union *organizing* activities. Paragraph 4 of the impugned letter covers a potentially vast category of union activity, reasonably including in our view, any discussion of the two employees’ involvement in prior proceedings before the Board arising because of their support for the union. Sub-section 11.1(2) has no application in those circumstances and on that basis, the employer’s arguments fail.

15. To put it another way, sub-sections 11.1(2) and (3) address the issue of access to premises for purposes of organizing or picketing where access might otherwise be affected by the *Trespass to Property Act*. One example was alluded to by the employer in its reference to Eatons, where union supporters were required by Cadillac Fairview, owner of the shopping centre, to remove themselves from the Eatons Centre or be subject to prosecution for trespass. That action on the part of the property owner restricted the access that the trade union was able to obtain to the employees of Eatons because many entered the store from the subway directly via the shopping centre premises (see *T. Eaton Company Limited, supra* and *Re Cadillac Fairview Corp. Limited et al, supra*).

16. These individuals are attending at work as employees, and in that context have access to the premises. The issue raised by challenging the inclusion of paragraph 4 in the letters is the extent to which an employer can legitimately interfere with the exercise of employees’ lawful rights in the workplace. The effect of the employer’s interpretation would be to take away an existing employee right. Section 72 of the Act has not been amended or repealed. *Adams Mine* sets out the balance that has been struck between an employer’s proprietary and commercial interests and the employees’ interests. In our view, that reasoning remains appropriate to the circumstances here.

17. Paragraph 4 of the letters given to the two employees is presumptively objectionable as it includes a prohibition against the employee engaging in any union activity or discussion of union related matters on their own time although on company premises. The employer led no evidence of circumstances that might warrant this restriction. While we are further troubled by the fact that this prohibition appears to have been implemented only in respect of these two employees who have already been found to have been penalized by the employer in violation of the Act, it is unnecessary to draw any conclusion as to whether that fact alone would also constitute a violation of the Act in the circumstances. We were satisfied that the inclusion of paragraph 4 in the two letters violated sections 65 and 67 of the Act and so declared that paragraph to be of no effect.

18. The union requested that we also direct that there be a posting in the workplace that provided for effective communication to employees regarding their rights, and specific and particu-

lar assurance that those rights would be protected. On careful consideration, we are not however satisfied that a posting makes sense in these circumstances. We have declared that the employer has violated sections 65 and 67 and have made clear to the parties that paragraph 4 of the letter was rendered ineffective. Those letters were only sent to those two employees. Other employees have not been advised of any such purported restriction on their activity and may well be unaware of the contents of paragraph 4. The union would have us advise employees that they are entitled to discuss union activity on their own time even on company premises. That however may well be an inappropriate restriction on employees' rights in the absence of an employer "no solicitation" rule. The employer may, on the other hand, be entitled to promulgate such a rule provided it does not otherwise contravene the Act. The precise exercise of the employees' rights is therefore not fixed. In addition, these two employees no longer suffer the restriction of paragraph 4 and will be able to discuss union matters with their co-workers which, in itself, will serve to assist in reducing any chilling effect. We are not persuaded that in these particular circumstances, a posting that is merely declaratory of the employer's violation in the absence of either its factual context or an ability to clearly affirm the employee's rights, is appropriate. For those reasons we therefore decline to order any further remedy.

0995-93-OH Chris Walker, Applicant v. Steep Rock Resources Inc., Responding Party v. Teamsters Local Union 91, Intervenor

Health and Safety - Practice and Procedure - Settlement - Employer asking Board not to inquire into complaint on the basis that the matter had been settled - Board finding no good reason to permit the applicant to resile from his agreement and some good reasons not to permit him to do so - Board not inquiring further into complaint

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *Jamie Wyllie*, *Keith Berry*, *Yvon Begin* and *Chris Walker* for the applicant and the intervenor; *Ray Werry* for the responding party.

DECISION OF THE BOARD; July 22, 1993

1. This complaint to the Board under section 50 of the *Occupational Health and Safety Act* came on for hearing on July 20, 1993.
2. The responding employer moved that the Board not inquire into the complaint on the basis that the matter had been settled, and requested that the Board direct the parties to abide by that settlement.
3. There was no dispute with respect to the facts material to this motion and request.
4. Although nominally an intervenor, Teamsters Local Union 91 has actively represented the applicant throughout this proceeding. The union retained counsel to represent the applicant's interests in that respect. On July 8, 1993, at approximately 4:00 p.m., counsel for the applicant and the union agreed with counsel for the responding employer that the proceedings before the Board would be disposed of as follows:

- (a) the applicant would be reinstated as an employee of the responding party on his next regular working day;
- (b) the application would be withdrawn and the matter referred to arbitrator Douglas Stanley to be dealt with by him;
- (c) the arbitrator would have jurisdiction to deal with all matters in dispute between the parties, including the applicant's allegations that he had been treated in a manner contrary to section 50(1) of the *Occupational Health and Safety Act*, and whether the suspension he received (measured from the date he was initially suspended to the date he returned to work) should be "sustained, reduced or eliminated".

Counsel also agreed to August 27, 1993 as the hearing date for the arbitration and communicated with arbitrator Stanley in that respect.

5. At approximately 10:00 p.m. on July 8, 1993, some six hours later, the applicant telephoned his counsel and advised him that he had changed his mind, and that he wanted to proceed with his application before this Board rather than on the basis of the agreement between the parties.

6. The responding employer did in fact reinstate the applicant and he has been working since July 13, 1993. However, this reinstatement was not pursuant to the agreement between the parties aforesaid but rather on the basis of the responding employer's unilateral decision to do so without prejudice to its or the applicant's positions with respect to this motion or otherwise.

7. The only reason the applicant changed his mind was that he decided he wanted the earlier hearing available before this Board, something which it was conceded he had considered when he agreed to the settlement agreement reached by counsel.

8. Section 50 of the *Occupational Health and Safety Act* provides that:

50.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection

(2), and section 91 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 104, 105, 108, 110 and 111 of the *Labour Relations Act* apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Despite subsection (2), a person who is subject to a rule or code of discipline under the *Police Services Act* shall have his or her complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

9. The Board clearly has the discretion not to inquire into a complaint under section 50 if it considers it appropriate not to do so. Upon considering the circumstances and representations of the parties in this case, the Board found it appropriate not to inquire into the applicant's complaint herein and so ruled, orally.

10. Section 50 of the *Occupational Health and Safety Act* gives a worker represented by a trade union who complains that an employer has contravened section 50(1) a choice. S/he can have the matter dealt with at arbitration under the applicable collective agreement, or by this Board. Initially, the applicant chose to come to this Board. Subsequently, all parties, including the applicant, agreed to have the matter dealt with at arbitration. In the Board's view, it is neither necessary nor helpful to inquire into the motivation of any party for entering into this agreement. Settlement agreements are entered into for all sorts of reasons, some of which may be understandable or significant only from the perspectives of the parties themselves. Further, this is not a case in which the applicant was tricked or improperly coerced into the settlement agreement. He had before him and considered all the necessary relevant information, and had the benefit of the advice of both his trade union and counsel. Nor is there any prejudice to the applicant if he is held to the settlement he agreed to.

11. Finally, the responding employer's motion raised significant labour relations and public policy considerations. As a matter of both labour relations and public policy, parties should be held to agreements they have freely enter into. To permit a worker who specifically agrees to a settlement in circumstances like those herein to resile from the settlement agreement would tend to undermine the union's ability to represent the employees in the bargaining unit in their employment relations with the employer, and would have a negative affect on the collective bargaining relationship. It would also tend to undermine the integrity and utility of the collective agreement settlement process and of the settlement processes of this Board.

12. In short, there was no good reason to permit the applicant to resile from his agreement, and some good reasons not to permit him to do so.

13. In the result, the Board will not inquire further into this complaint. The Board does find it appropriate to make the direction requested by the responding employer (which was unopposed if the Board decided as it did). The parties are therefor directed to proceed to arbitration with respect to the matters which have been placed in issue between them on the terms and conditions agreed to by them (see paragraph 4, above) subject only to a mutually satisfactory date for hearing being agreed to if August 27, 1993 is no longer available to any party or the arbitrator.

2797-92-R International Union of Operating Engineers, Local 793, Applicant v. The Corporation of the Township of Limerick, Responding Party.

Certification - Employee - Employee Reference - Township's "Road Superintendent" not exercising managerial functions within meaning of section 1(3) of the Act - Certificate issuing

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

DECISION OF THE BOARD; July 20, 1993

1. This is the continuation of an application for certification.

2. By decision dated January 18th, 1993 the Board noted the parties' partial agreement with respect to the description of the bargaining unit and appointed a Labour Relations Officer to inquire into and report on the duties and responsibilities of the Road Superintendent, Murray Mountney, and on the question of whether a further employee, A. Boomhour, should be included on the schedule of employees filed by the responding party, The Corporation of the Township of Limerick (the "employer" or the "Township"). It is the employer's position that Mr. Mountney performs managerial functions within the meaning of section 1(3) of the *Labour Relations Act* (the "Act") and that Mr. Boomhour is a "casual employee" and should not be included on the list.

3. On March 29, 1993 the Labour Relations Officer completed her report, which includes a transcript of the evidence of Mr. Mountney and records the parties' agreement that Mr. Boomhour should not be included on the employer's list. Accordingly, this decision deals only with the status of Mr. Mountney.

I

4. Section 1(3) of the Act states:

1(3) For the purposes of this Act, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Generally speaking, and in furtherance of the conflict of interest rationale that underlies this provision, individuals will be found to exercise managerial functions if they fall into either or both of two broad categories. First are those persons whose work impacts only indirectly on the terms and conditions of employment of their fellow employees. Individuals falling within this category will be found to exercise managerial functions if they make independent decisions on important matters of policy or the running of the organization. Effective recommendations, independent decisions cir-

cumscribed within predetermined limits set by others, or technical or procedural determinations based upon expertise in a limited field will not be sufficient to exclude an individual from the definition of “employee” under the Act. Second are those individuals whose decisions have a more direct and immediate impact upon the day-to-day working lives of their colleagues. The test for managerial status here is whether the individuals make “effective recommendations”, i.e. recommendations that are “so consistently and frequently followed that it could be said that through the recommendations the [individual is] effectively controlling or determining the decisions”: *Etobicoke Hydro-Electric Commission*, [1981] OLRB Rep. Jan. 38. The onus of establishing that an individual is managerial because he or she falls within either or both of these categories rests with the party seeking the exclusion.

II

5. Mr. Mountney is a member of the Roads Department. He is one of only two regular employees in the department and in the proposed bargaining unit. The second is William O’Hara, the Township Operator. The Roads Department is responsible for maintaining the Township’s roads including such matters as ploughing, sanding, paving, gravelling, culvert maintenance, ditching, brushing, etc. As the Road Superintendent, Mr. Mountney is also a member of the Roads Committee of the Township Council. The Roads Committee is responsible for making recommendations to Council on matters concerning the Township’s roads. The other members of the Committee are the Reeve and two councillors. The Roads Committee reports to the Township Council, which is comprised of the Reeve and four councillors, two of whom are on the Roads Committee.

6. A budget for the work of the Roads Department is set annually in advance. Mr. Mountney is involved in the initial preparation of the budget, based on previous years experience, but he does not approve it either alone or in conjunction with anyone else. Approval rests with the Township Council. Council also sets the overall priorities assigned to the work based upon recommendations from the Roads Committee and, initially, Mr. Mountney. Priorities may be set weekly, yearly or in the form of a five year plan.

7. Mr. Mountney’s other “non-operational” tasks include maintaining a daily journal of the work performed in relation to a road, the time it took to perform it and an estimate of the cost. At the end of each month, Mr. Mountney passes this information on to the Clerk of the Township who forwards it to the Ministry of Transportation. The keeping of the daily journal also permits Mr. Mountney to monitor the work performed and the amount of money spent in relation to each road so as to adhere to the budget and policies set by Council. If the budgetary allotments do not prove to be adequate and it is necessary to take funds from one area to cover a shortfall in another, Mr. Mountney must obtain approval from Council following a recommendation from the Roads Committee.

8. Mr. Mountney has been delegated the authority to spend up to \$5,000.00 on goods or services for which provision has been made in the budget. Although Mr. Mountney sometimes makes recommendations to the Roads Committee to obtain approval for such purchases, he need not do so. By and large, the expenditures appear to be of a routine “supply” nature relating to such matters as the maintenance of equipment, sand and salt for the roads, etc. Within the \$5,000.00 limit, Mr. Mountney also decides to which budgeted account the purchases will be charged. For amounts in excess of \$5,000.00, a tender process must be followed. Mr. Mountney is involved in the initial preparation of the request for tenders and their subsequent review by the Committee. The decision to accept a tender, however, is made by Township Council following a recommendation from the Committee.

9. Mr. Mountney is also responsible for patrolling the roads to see what needs to be done

and will undertake normal maintenance, such as unblocking a culvert, without further approval. Mr. Mountney also “supervises” construction projects carried out by contractors, which may include answering questions, putting out road signs, placing flagmen in the necessary spots, etc. Mr. Mountney has signing authority in respect of Bell and Hydro lines and has been involved in assessing certain of the Township’s needs, such as the gravel supply.

10. The vast majority of Mr. Mountney’s time, however, is spent performing work similar to that performed by the Township Operator, Mr. O’Hara. According to Mr. Mountney, Mr. O’Hara “drives a truck in the summer, he operates the backhoe, he grades, runs the grader, adjusts whatever there is, and if there is any general labour, if he is ... a lot of the time he does that as well, and maintenance”. Mr. Mountney testified that approximately 80 per cent of his own time is devoted to such work, sometimes alongside Mr. O’Hara. In fact, the two are “on call” on alternate weekends throughout the year to perform the same tasks. It was perhaps for this reason that Mr. Mountney began his examination by describing an average day’s work as, “... if we have to plough, then I come in and we get the plough ready to go, I take it and away we go, and Bill wings for me.” He also pointed out that his official classification is “Working Road Superintendent”.

11. In addition to performing his own work, Mr. Mountney acknowledged that he is at least partly responsible for the work performed by Mr. O’Hara and decides which work each will perform during the day. However, the decision to hire Mr. O’Hara was made by Council. According to Mr. Mountney, his only role was that of an “advisor”. Although Mr. Mountney sat in on the interviews and made recommendations, there is no clear evidence as to what those recommendations were or as to their “effectiveness”.

12. After hiring, Mr. O’Hara was subject to a probationary period. Once again, Mr. Mountney’s role was to “advise” the Roads Committee as to how Mr. O’Hara was doing and to provide Mr. O’Hara with informal feedback. Mr. Mountney said that he gave no formal recommendations to the Committee, simply remarking that Mr. O’Hara “was doing fine and that he was improving on the grader”. The decision to continue Mr. O’Hara’s employment was entirely that of Council. Mr. O’Hara’s annual salary, along with that of Mr. Mountney, is determined by Council sitting in caucus without Mr. Mountney’s involvement.

13. Mr. Mountney has not been involved in any formal performance review of Mr. O’Hara, but has made comments “in general conversation” to the Reeve or one of the councillors as to how Mr. O’Hara is doing. Mr. Mountney testified that Township Council is “hands on” and usually has an opportunity to witness Mr. O’Hara’s work on a day-to-day basis. If something goes wrong, members of Council may ask Mr. Mountney whether it was Mr. O’Hara’s fault. Disciplinary decisions, however, rest with Council. In what appears to have been the only instance of “discipline” to date, a taxpayer complained to a councillor about Mr. O’Hara’s attitude. Mr. Mountney was then directed to speak to Mr. O’Hara about it.

14. Mr. Mountney prepares both his own time sheets and those of Mr. O’Hara for submission to the Township Clerk. Overtime payments are “calculated into” both Mr. Mountney’s and Mr. O’Hara’s annual salary. Mr. Mountney has the authority to grant casual time off to Mr. O’Hara e.g. to go to the doctor or dentist, or in an emergency situation, but lengthier periods require approval by the Roads Committee. The Committee also approves vacation schedules. Any decision as to whether Mr. O’Hara would be laid off would be up to Township Council.

15. Mr. Mountney also exercises the authority delegated from Council to hire part-time and casual employees during peak construction periods. Mr. Mountney gave as the reason for this authority the difficulty of getting together a quorum of Council, which ordinarily meets monthly, to make “emergency” hires on a short-term basis. Although Mr. Mountney’s evidence varied on

this point, it would appear that anywhere from one to four people may be hired at a time, working for as little as one day or as much as one month. These individuals generally work full-time and, therefore, would appear to fall within the scope of the agreed upon bargaining unit. Typical of the work performed is the task of flagman on a construction project. Mr. Mountney generally hires from among the same group of six to twelve individuals. There is no evidence that Mr. Mountney has ever had occasion to discipline or “discharge” any of these individuals or as to whether he would have the authority to do so.

16. Finally, the evidence is that another employee, Clayton Hiltz, the waste disposal custodian, was placed under Mr. Mountney’s jurisdiction, at least for purposes of advice with respect to days off. There was no other information, however, about the relationship between Mr. Hiltz and Mr. Mountney.

III

17. It appears to the Board from the membership evidence and Mr. Mountney’s approach to certain questions that he may have been guided somewhat by self-interest in giving his evidence. However, even allowing for the possibility that certain of Mr. Mountney’s answers may have been “shaded” in the direction of “employee” status, the Board is not satisfied that Mr. Mountney exercises “managerial functions” within the meaning of section 1(3) of the Act.

18. In matters of policy or the running of the organization, the evidence is that except for the expenditure of funds of up to \$5,000.00 and what may be described as routine operating decisions, real authority rests with Township Council. Council sets the budget, authorizes any significant purchases and determines the overall priorities assigned to the work. Mr. Mountney’s role, filtered through the Roads Committee, is essentially a recommendatory one and there is little or no evidence as to how often those recommendations are followed.

19. The evidence of Mr. Mountney’s direct involvement in the terms and conditions of employment of his fellow workers must be considered in light of the number of employees actually affected and the entire employment context. Except in the case of casual employees and apart from such routine matters as work assignment, time keeping and the granting of occasional time off, the evidence again is that real managerial authority is exercised by Council. This includes decisions related to hiring, firing, lay-off, discipline and salary. There is no evidence that Mr. Mountney has any substantial input into these areas, let alone the power to make effective recommendations. In the case of the casual workers, the Board is not satisfied that the occasional hiring of the same employees during the summer months is sufficient to give rise to the kind of mischief to which section 1(3) is directed. The number of employees is limited, the “discretion” exercised in selection is rudimentary, the period of employment is brief and determined by the length of the project, and there is no evidence that Mr. Mountney either has, or could, effectively impose discipline or terminate their employment prematurely. For the most part, amounting to approximately 80 per cent of his time, Mr. Mountney carries out substantially similar work to the undisputed member of the bargaining unit, Mr. O’Hara.

20. The Board therefore finds that Mr. Mountney does not exercise “managerial functions” within the meaning of section 1(3) of the Act.

21. The Board also finds that all employees of The Corporation of the Township of Limerick in the Township of Limerick, save and except Clerk Treasurer, persons above the rank of Clerk Treasurer, office and clerical staff and Chief Building Official, By-Law Enforcement Officer and employees working less than twenty-four (24) hours per week, constitute a unit of employees of the responding party appropriate for collective bargaining.

22. The Board is further satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on December 16, 1992, the certification application date, had applied to become members of the applicant on or before that date.

23. A certificate will therefore issue to the applicant.

3095-92-U Ontario Secondary School Teachers' Federation, Applicant v. The Essex County Board of Education, Responding Party

Adjournment - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to adjourn unfair labour practice complaint pending resolution of employment status issue - Board declining to dismiss application for want of particulars - Board declining to dismiss application for failure to raise *prima facie* case - Board directing responding party to proceed first with its evidence

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *W. H. Wightman* and *K. Davies*.

APPEARANCES: *Eric del Junco*, *Donald Abrash* and *William Reith* for the applicant; *L. P. Kavanaugh*, *A. M. N. Vannelli* and *Doug Fox* for the responding party; *Shelley Gagné*, *Christine McLeod*, *Chris Woodrow*, *Dave Bradt* and *Nhan Nguyen*, interested parties.

DECISION OF VICE-CHAIR, ROMAN STOYKEWYCH AND BOARD MEMBER, K. DAVIES;
July 19, 1993

1. This is a complaint under section 91 of the *Labour Relations Act*. The applicant trade union alleges that the responding party employer, by virtue of certain measures it has taken in reorganizing its workforce shortly after certification had been granted, has breached sections 3, 15, 65, 67, 71 and 81 of the *Labour Relations Act*.

2. A hearing was held in this matter in Windsor, Ontario on April 27 and 28, 1993. The proceeding was confined to submissions with respect to a number of procedural issues raised by the responding party employer. The employer took the position at the hearing that:

- A. the present application ought to be adjourned pending the resolution of the employee status issues that, it contends, underlay the dispute in this matter;
- B. the application ought to be dismissed for want of particulars, or in the alternative, that further particulars ought to be ordered;
- C. the application ought to be dismissed for lack of a *prima facie* case;
- D. the applicant should shoulder the procedural onus and proceed first with its evidence should the application proceed.

3. After considering the submissions of the parties on these issues, the Board rendered oral rulings that determined the matters. As requested by the parties, and further to our decision

issued on July 16, 1993, we shall now provide a description of those matters as well as our reasons for making the determinations in question.

4. The allegations of the trade union are set out in particulars that have been filed with the Board and with the employer. These may be summarized as follows. Following a representation vote, the trade union was certified by the Board on January 3, 1992 to represent those employees falling within the following bargaining unit:

all employees of the respondent in the County of Essex, save and except supervisors, persons above the rank of supervisors, director of education, supervisory officers, co-ordinator of care-taking, payroll accountant, health and safety officer, J.E.A.P. co-ordinator, executive secretary to the director of education, secretary to the secretary of business, assessment officer, manager of computer services, area supervisors, manager of administrative services, adult worker, manager of plant, benefits secretary, secretary to the manager of human resources, human resources secretary, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, persons employed in a co-operative training program with a school, college or university and employees in bargaining units for which any trade union held bargaining rights as of November 5, 1990.

Clarity Note: The following positions are excluded from the bargaining unit on the basis that they exercise managerial functions within the meaning of section 1(3)(b) of the Act:

- i) Manager of Administrative Services
- ii) Area supervisors
- iii) Health and Safety Officer
- iv) Co-ordinator of Caretaking
- v) Assessment Officer
- vi) Payroll Accountant

5. Although there was agreement during the certification proceedings as to the bargaining unit description, shortly after certification the employer initially took the position that three additional positions should be excluded from the bargaining unit on the grounds that the incumbents were performing managerial functions. These positions were the "Co-ordinator of Community Relations", "Buyer", and "Purchasing Agent". The applicant denies that the duties performed by the persons in these positions are in fact managerial, and has taken the position throughout bargaining that they should remain included in the unit. In its pleadings the trade union details the employer's reorganization and the resultant changes of incumbency in the following terms:

At the date of certification, the position of Purchasing Agent was held by Bob Patterson. Subsequent to certification, Mr. Patterson was promoted from Purchasing Agent to Manager of Purchasing and Warehousing, a position which the complainant agrees is managerial. The position of Purchasing Agent was renamed and became known as "Assistant Purchasing Agent." This position was filled by Christine McLeod, who had previously worked as a Buyer. The Buyer position vacated by Christine McLeod was filled by a new employee, Laurie Chalaepatta. The duties and responsibilities of the Buyer and the Assistant Purchasing Agent appear to be substantially identical and both employees receive the same salary. There has been no change in the incumbency of the position of Co-ordinator of Community Relations since the date of certification. That position was and is filled by Chris Woodrow.

6. The applicant asserts that there have been no substantial changes in the job duties and responsibilities of these three positions since the date of certification. The applicant, in further particulars filed with the Board in correspondence dated April 13, 1993, states that the above-noted Christine McLeod, now in the purportedly excluded position of Assistant Purchasing Agent, held the position of Vice-President of the bargaining unit, a fact which the applicant further asserts was obviously known to the respondent.

7. The applicant alleges that on December 15, 1992, the employer advised the trade union

that it was unilaterally changing the salary and benefits of these three employees as of January 1, 1993, and that the basis for this action was its belief that the positions are managerial.

8. In further particulars dated March 12, 1993 and filed with the Board on March 16, 1993, the applicant made a number of assertions of fact with respect to a further reorganization of the employer's workforce. The trade union was advised by the employer on February 23, 1993, that three additional employees in the computer department would be reclassified as "managerial" and therefore would no longer be considered to be within the bargaining unit. Effective that date, David Bradt and Shelly Gagne-Deslippe would assume positions renamed "Software Analyst II", while Nahn Nguyen would become the "VAX Administrator". At the time, the employer asserted that these employees had been assigned supervisory duties over other employees such that they would properly be excluded from the bargaining unit set out above. The union denies this to be the case. Ms Gagne-Deslippe had held the union position of "Chief Negotiator" for the bargaining unit. The union asserts that she was advised by Douglas Fox, Superintendent of Human Resources, that she could not continue to exercise her functions as Chief Negotiator for the trade union as a result of the re-organization.

9. As noted above, the applicant alleges that the actions of the employer in the course of these reorganizations of the workforce contravene sections 3, 15, 65, 67, 71, and 81 of the *Labour Relations Act*. A statement of that position is set out in correspondence (over the signature of trade union counsel) dated April 13, 1993, which was filed with the Board in response to the responding party's request for further particulars. In that correspondence, counsel for the trade union sets out what might fairly be called the applicant's theory of the case:

As stated in the complaint, it is the complainant's position that the respondent's conduct as a whole in purporting to unilaterally exclude those positions from the bargaining unit has fundamentally undermined the unit and the status of the complainant as bargaining agent. It is also the complainant's position that *all* of the respondent's dealings with these individual employees on an individual basis outside of the bargaining process is in violation of the Act and inherently intimidating and coercive, regardless of the subjective perception of the employees themselves. In short it is the complainant's position that the unilateral exclusion of these positions constitutes bargaining in bad faith contrary to section 15, interference in the administration of a trade union contrary to section 65, interference in the rights of employees contrary to section 3 and section 67, intimidation and coercion contrary to section 71, and a breach of the statutory freeze contrary to section 81. This position is obviously independent of any *overtly* oppressive conduct toward any of the 6 employees involved. Indeed, in these circumstances it is not surprising that the employees might be quite happy with their new-found "managerial" status, especially in light of the pay increases some of them may have received.

10. The employer has filed extensive reply materials both with respect to the initial complaint filed by the trade union as well as to the further particulars filed in March. For present purposes it is unnecessary to quote these carefully drafted and detailed materials. It suffices to say that the employer denies the vast majority of the assertions of fact set out above, and vigorously disputes the legal conclusions that the applicant requests us to draw on that basis. Primarily, it is the position of the employer that the reorganization processes referred to above were undertaken for entirely legitimate organizational reasons, that it accepted the trade union's invitation to discuss these exclusions at the bargaining table, that the wage and benefits increases were instituted for the employees in question as a matter of automatic procedure after the trade union had declined to agree to a similar increase with respect to those employees covered by the bargaining unit description. Finally, and underlying the employer's position in this matter is the assertion that all of the employees in question in fact perform duties that the Board has recognized in the past to be of a managerial nature, and that as a result, they are properly excluded from the bargaining unit. It denies that any remedy should be available to the trade union in this matter and requests that the application be dismissed.

A. Request for Adjournment: Deferral to Section 108(2) Procedure

11. It was the employer's first position that the matter is more properly brought as an application pursuant to section 108(2) of the Act and ought not to have been processed as a section 91 complaint. For that reason, it was contended, the present matter ought to be adjourned pending the resolution of the determination of the aforementioned six questioned persons' "employee" status.

12. Section 108(2) provides as follows:

If in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board is final and conclusive for all purposes.

13. In his argument, counsel for the employer characterized the question of the employee status of the persons under consideration to be the "real issue" underlying the entire matter such that its resolution would be largely dispositive of the entire complaint. Counsel made a number of observations in this respect. He summarized his position in this matter by stating that the two forms of proceeding were "like oil and water". First, it was his submission that the procedure developed by the Board pursuant to its powers under section 108(2) was a comprehensive mechanism for the determination of status issues; counsel suggested that the mere availability of that provision precluded the determination of employee status under other provisions of the Act. In this respect, it was explained that the reason why no such application had been brought by his own client to date was its belief, apparently no longer held, that the provisions of section 108(2) were applicable only to circumstances in which negotiations had actually commenced. Notwithstanding this apparent anomaly, it was argued that, in effect, the trade union was barred from proceeding with the section 91 application pending the determination of the employee status issues under section 108(2). At the hearing of this matter, it should be noted, counsel for the employer undertook to file on his client's behalf an application pursuant to section 108(2).

14. Further, it was argued by employer's counsel that a determination pursuant to section 108(2) was in the nature of a preliminary question in this matter, since the sections of the Act that the trade union relies upon, with the possible exception of section 81, have no application to persons other than "employees". In light of this, counsel contended, if there was a finding that the persons in question were not "employees", then that determination would be entirely dispositive of most if not all of the complaint. As noted above, counsel undertook on behalf of his client to file an application pursuant to section 108(2). In the interim, however, he asked the Board to exercise its discretion to adjourn the present application.

15. After hearing the parties' submissions, the Board retired briefly to consider that adjournment request. Upon returning, we advised the parties that the Board was not convinced that an adjournment was appropriate in the circumstances and that consequently, we denied the employer's request. We did so for the following reasons.

16. In our view, the determination of employee status of the persons in question, although an issue that is likely to arise in the course of the litigation of this matter, is not likely to be dispositive of the issues before us. The allegations of the trade union go substantially beyond the single question of those persons' present employee status and address the reasons and motive for the employer's action that affected an alteration in that status, as well as the effect those actions may have had upon individual employees, on the one hand, and the integrity of the bargaining unit, on

the other. A finding by the Board that the employees in question exercise managerial functions would not likely address those issues.

17. Moreover, we do not accept the assertion of counsel for the employer that the language of section 108(2) precludes the litigation of unfair labour practice allegations in which employee status is or may be an issue. That position is contrary to the Board's practice and is not supported by the language of section 108(2). The Board has on numerous instances made determinations of an employee status pursuant to section 1(3)(b) of the Act in the course of unfair labour practice complaints, certification applications, termination applications and other proceedings. (See for example *AAS Telecommunications*, [1976] OLRB Rep. Dec. 751 and *Simpsons Limited*, [1989] OLRB Rep. May 513.) The difficulties in the employer's position in this respect became apparent during the course of argument, particularly in light of his client's position that an application under section 108(2) could be brought only after bargaining had actually commenced. These difficulties were highlighted by the further position taken by employer counsel that the relevant date for the Board's inquiries upon any such application would be the date upon which the examinations were actually held, not the date of the section 91 application, nor the date of filing of any forthcoming section 108(2) application. Consequently, counsel was driven, during the course of argument, to assert that there was a temporal gap (i.e., between the date of certification and the actual date of examination), purportedly intended by the legislature, during which time **neither** applications to examine for purposes of employment status nor section 91 complaints involving an issue touching upon employee status could be initiated. We cannot accept that the language of section 108(2) requires the Board to reach such an extraordinary result, especially in light of the discretionary language used in that provision. Nor can we understand how an undertaking to initiate an inquiry under section 108(2) would be even marginally useful when the relevant date of inquiry as to the duties would be many months, if not years, subsequent to the events of which the trade union complains.

18. Similarly, the Board finds no merit in the argument that the provisions of the Act the trade union relies upon, being applicable only to "employees", would render the trade union's position in the section 91 complaint without foundation were the employer to be successful in a section 108(2) application. That the provisions relied upon by the trade union have application only to employees is far from clear. Moreover, it is not inconceivable that an employer could violate the Act by improperly assigning managerial duties. The employer's argument, in this respect, relies too much upon its own bootstraps, as it relies on the status resulting from the impugned action, rather than on the action itself. Yet, it is the essence of the trade union's allegation that the reorganization, in which precisely the duties upon which the employer purports to rely in its defence, were assigned in a manner motivated by bad faith, and with the effect of disturbing individual rights and undermining the authority of the trade union.

19. Accordingly, we see nothing in the issues regarding the employment status of the persons in question that should prevent this matter being heard in the context of a section 91 application, and accordingly, we see no reason to exercise our discretion to adjourn the complaint under section 91 pending the resolution of an application under section 108(2).

B. Failure to Raise Prima Facie Case

20. The employer argued that with the exception of the complaint as it relates to section 81 the facts as pleaded by the trade union did not raise a case to which it needed to respond. Thus, the employer requested that the Board exercise its discretion under Rule 24 of the Board's Rules of Procedure to dismiss the complaint.

21. Rule 24 reads as follows:

Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing. In its decision, the Board will set out its reasons. The applicant may within twelve (12) days after being sent that decision request that the Board review its decision.

22. During argument, counsel asserted that nothing that was advanced by the trade union in its pleadings could result in a finding of a violation of the various provisions for which remedies are sought. Indeed, it was the position of the employer that the allegations, as pleaded, were so lacking in substantial legal content as to constitute an abuse of the Board's processes. Thus, he stated that there were no material facts advanced to support an allegation with respect to undermining of rights to participate in a trade union (section 3); nothing in the pleadings referring to the content of the bargaining between the parties so as to ground an allegation of bad faith bargaining (section 15); nothing relating to interference in the administration or formation of a trade union (section 65); nothing with respect to employer interference with individual rights (section 67); and nothing with respect to coercion or intimidation (section 71). As noted however, the employer conceded that the facts, as pleaded, could constitute a breach of section 81 of the Act if they were proven to be true.

23. By contrast, trade union counsel argued that the basic fact of the removal of all six positions from the bargaining unit, after they had been specifically agreed upon as included during the certification process, is sufficient to trigger those provisions of the Act. In particular, it was argued that the employer's resort to "self-help" during the course of bargaining was tantamount to bargaining to impasse on bargaining unit description and thus, a violation of the good faith bargaining duties; that the direct dealings with bargaining unit members during the course of negotiations constituted violations of the Act; and that the actions of the employer in classifying the six positions as managerial, especially bearing in mind the trade union positions of two of the incumbents, had both the effect of discouraging or altogether preventing participation in trade union activities as well as undermining the authority of the trade union.

24. In our view the pleadings presented by the applicant are not so deficient as to warrant dismissal of any parts of the complaint for lack of *prima facie* case. Rule 24 provides a mechanism by which the Board may avoid hearing applications that are entirely without merit and would have no chance of success even were the facts pleaded to be made out. Even then, however, the Board retains a discretion to refuse to dismiss an application on those grounds. Upon examination of the pleadings, and after careful consideration of the submissions of the parties, we decline to accede to the employer's request to dismiss the application on this basis. Moreover, notwithstanding the requests of the parties, we are unanimously of the view that it would be inappropriate at this stage of the proceedings to comment further upon the basis of our conclusion in this respect. The disclosure of the Board's reasoning at this stage would serve no purpose other than to provide the parties a "first inning score" with respect to the application. This is not an appropriate function of the Board's interlocutory proceedings. The Board notes, in this respect, that the requirement for written reasons set out in Rule 24 is restricted to circumstances in which the Board finds it advisable to dismiss the application. In the present circumstances, it is sufficient to say that with respect to each of the allegations, it is the Board's view that the allegations raised in the application are ones that raise an arguable case.

25. Accordingly, we decline to dismiss the application on the grounds that the pleadings do not make out a *prima facie* case.

C. Adequacy of the Particulars

26. It was the further position of counsel for the employer that the application should be dismissed for want of sufficient particularity, and in the alternative, that further particulars ought to be ordered. In this respect, counsel relied upon Rules 12(d) and 20, which provide as follows:

12. Any application filed with the Board must include the following details:

• • •

d) a detailed statement of all material facts on which the applicant relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.

20. No person will be allowed to present evidence or make any representations at any hearing about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

27. Here again, counsel professed a virtually complete lack of understanding of the allegations that were being levelled against his client. Accordingly, the thrust of his argument was to the effect that the pleadings were so wanting in particularity as to make it impossible for his client to understand and therefore prepare for the case against it. Consequently, it was urged upon us to exercise our discretion and to dismiss the application. In the alternative, it was argued that the applicant should be ordered to provide fuller and better particulars. It is noteworthy that aside from making reference to the absence of material facts raised by the applicant with respect to the bargaining in so far as it relates to the complaint pursuant to section 15, the employer did not specify in what respect the particulars were deficient; the position apparently taken was that the particulars were **entirely** lacking in particularity. Accordingly, the Board was left with no indication as to what specific difficulty was encountered by the employer as a result of the purportedly deficient particulars.

28. During the course of argument, counsel for the trade union stated that his client had already pleaded all the particulars it had in its possession, and that its entire case lay in the facts that had been set out in its pleadings. With respect to the bad faith bargaining complaint, it was stated that no reliance will be placed upon the actual bargaining, but rather, upon the “self-help” carried out before bargaining even commenced. He indicated that his client was prepared to proceed on the basis of the facts pleaded and submitted that the employer’s motion ought to be dismissed.

29. After reviewing the submissions of the parties, and after examining the materials before us, we determined that the pleadings, insofar as they make assertions of fact and allegations of breaches of the Act, are pleaded with sufficient particularity so as to satisfy the requirements of the Rules set out above. In addition, in our view they are pleaded with sufficient particularity so as to permit the employer to prepare its case. Each of the material facts upon which the trade union intends to rely is referenced to a specific circumstance in which they arose, and on the whole, they present a sufficiently clear picture of the applicant’s position so as to give rise to an understanding of the factual basis upon which the applicant rests its case. Insofar as the issue of lack of particulars concerning the bargaining history is concerned, we are of the view that this is a matter more germane to the issue of the legal substance of the allegation, rather than to the presence or absence of particulars, and has been dealt with above. Otherwise, we are not prepared to enter into a detailed analysis of the adequacy of the particulars as they relate to specific circumstances, particularly in light of the employer’s failure to do so during the course of his argument in this respect.

30. Counsel for the trade union was expressly given the opportunity to present further particulars, but declined to do so. Accordingly, while we are prepared to permit the pleadings in their present state to be the basis of this proceeding, that opportunity for further disclosure may well be of significance in the event that the trade union wishes to present further material facts that during the course of the hearing it could have disclosed at that time. If the trade union seeks to raise material facts that were not properly put before the Board in its pleadings, the employer may of course renew its objections pursuant to Rule 20 of the Board's Rules of Procedure.

31. Accordingly, we ruled that the application was pleaded with sufficient particularity, and accordingly, dismissed the employer's motion on these grounds.

D. Order of Proceeding

32. Counsel for the employer argued that the trade union ought to proceed first with the presentation of its evidence. Employer counsel's primary argument was to the effect that there were no allegations properly before the Board that attracted the reverse onus provisions of section 91(5) of the Act. In this regard, counsel repeated his argument that the provisions of the Act have no application to any of the present circumstances, save the allegations under section 81, given that the persons complained about were not employees under the Act. That argument has been addressed above. In addition, counsel repeated his argument that there was no *prima facie* case with respect to any allegation other than those relating to section 81 of the Act. The result of both or either of these arguments, he asserted, was that the reverse onus provisions of section 91(5) do not have application to the matter before us since, he asserted, the remaining allegations before us do not attract the reverse onus provisions. Accordingly, he contended that there was no basis upon which to displace the general principle that the party who alleges bears both the procedural and legal burden of proof. Indeed, it was vigorously argued that the making of such an order in this case would amount to a monstrous injustice, since it would permit the trade union to make out its case in cross examination.

33. After hearing the submissions of the parties, and recessing to consider the matter, a majority of the Board, with Board Member Wightman dissenting, ruled that in the circumstances of this case, the employer should proceed first with evidence as to all of the allegations raised by the applicant. We now provide reasons for that ruling.

34. Section 91(5) reads as follows:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

35. The language of that provision clearly indicates that in instances where there is an allegation of improper treatment of individuals by employers as to their employment, opportunity for employment or conditions of employment, the employer bears the *legal* burden of proof with respect to the disproof of those allegations (*The Barrie Examiner*, [1975] OLRB Rep. Oct. 745). The customary allocation of the burden of proof remains in place in those instances where section 91(5) does not have application.

36. The Board has on numerous occasions had the opportunity to consider the issue of the order of proceeding where, given the restricted application of section 91(5), there is a "mixed" legal onus with respect to allegations brought under various provisions of the Act. It is a general principle, accepted at the hearing by both the employer and the trade union, that the party that is

required to proceed first in a mixed onus case will be required to proceed with all aspects of the case, irrespective of the placement of the legal burden of proof. Thus, the party that proceeds first will be required to adduce as part of its evidence in chief evidence on all of the allegations, and not just on those concerning which it bears the legal burden of proof. (See, for example, *Craftline Industries*, [1977] OLRB Rep. April 246; *Wilco-Canada Inc.*, [1983] OLRB Rep. January 165; *Domtar*, [1982] OLRB Rep. July 993.) As indicated in *Canadian Pizza Co. Ltd.*, [1983] OLRB Rep. June 872, the Board is unwilling to allocate the procedural onus strictly on the basis of the legal onus in light of the difficulties involved in staging what would in effect be a four-stage proceeding.

37. Although the Board was initially reluctant to order an employer to proceed first in circumstances where all of the allegations did not attract the reverse onus provisions (*Craftline, supra*), nevertheless, the law is clear since *Domtar, supra*, that the Board possesses a discretion to order its proceedings in this respect. The considerations that the Board has utilized in making such a determination include the proportion of the overall evidence that will be related to employer conduct alleged to be contrary to the Act as stipulated in section 91(5); the extent to which the allegations that do not attract the reverse onus provisions are integrally related to those that do so attract the provisions of section 91(5); and whether the facts alleged by the applicant are peculiarly within the knowledge of the employer; whether procedural difficulties, including substantial embarrassment to the employer, would arise were the employer to be required to proceed first. (See for example *Domtar, supra*; *Canadian Pizza, supra*.)

38. The Board's reasoning in *Domtar* is particularly instructive with respect to the present circumstances. In *Domtar*, the applicant alleged that the employer instituted layoffs for anti-union reasons (to which the Board concluded section 91(5) was applicable), as well as failed to advise the trade union of its decision in this respect during the course of bargaining (to which the Board concluded section 91(5) was inapplicable). The Board concluded that the respondent should proceed first with respect to all the allegations made, not just the ones in respect of which it bore the legal burden. After noting that the bulk of the evidence would relate to matters to which section 91(5) applied, the Board's exercise of its discretion was expressed in the following manner:

9. ... The section 15 allegation is integrally related to the other fundamental and primary allegations. We are not of the view that the case is one primarily relating to bargaining conduct nor can we conclude that the other sections of the Act were relied upon simply to achieve the employer proceeding first on the section 15 allegation. All the allegations involve many common factual features; we see no substantial embarrassment to the employer if it is required to proceed first; and much of the allegations involve matters primarily within the employer's knowledge.

39. Similarly, in *Canadian Pizza supra*, where the issue was the order of proceeding in a mixed onus case involving an allegation pursuant to what was then section 8 of the Act, the basis of the decision to require the employer to proceed first was formulated in the following manner:

7. ... In these circumstances, the bulk of the evidence heard by the Board will be in respect of employer conduct which is alleged to be contrary to the Act as to the employment, opportunity for employment or conditions of employment of the employees affected. The employer bears the legal burden of establishing that he did not act contrary to the Act when this type of allegation is made. In addition, the facts as to why the employer acted as he did lie peculiarly in the knowledge of the employer. It is to be observed as well that in a number of section 8 [now section 9.2] cases that have been consolidated with section 89 [now section 91] complaints triggering the reverse onus, where the union proceeded first, the Board has found itself in the difficult position of having to make some very difficult determinations as to the proper scope of reply evidence. In this case, the applicant union alleges that 11 employees of the respondent have been laid off because of their support for it. In addition, the applicant claims that a number of threats with respect to the continued employment of the trade union supporters have been

made. Having regard to the nature of the section 89 complaint, the employer bears the legal burden under section 89(5) of establishing that he did not act contrary to the Act. The bulk of the evidence will be in respect of the section 89 allegations and these allegations are the central focus of this matter. In these circumstances, we have been convinced that we should direct the employer to proceed first.

i.) Proportion of Evidence Governed by Section 91(5)

40. In the view of the majority of the panel of the Board, the significant bulk of the evidence that will be led in the present application will relate to matters governed by section 91(5). The circumstances surrounding the reorganization, including its purpose, motive, and effect, constitute the core factual issue that is before us. Although the issue of employment status *per se* is not dispositive of all the issues before us, nonetheless, it is our view that the central factual basis of the trade union's application in its entirety is the employer's decision to alter the employee status of six persons in its employment in the period subsequent to certification. On the assumption (made for the purposes of this ruling) that the applicant's pleadings are true, the employer's actions in so doing can fairly be termed an alteration of the employees' terms and conditions of employment that is, arguably, treatment contrary to the Act. For this reason, we are of view that these allegations, which are central to the applicant's case, could attract the application of section 91(5).

41. It should be noted that our primary reference is to the factual basis of the allegations that have been raised, rather than the sections of the Act that have been pleaded. In this respect, we do not accept the suggestion by counsel for the employer that the reverse onus provisions of the Act do not apply to allegations made under sections 15 and 81 of the Act *per se*. Although the Board may initially have restricted the application of that provision to sections of the Act that expressly enumerate individual employee rights, (*Craftline Industries, supra*, par. 2) the Board has subsequently made it clear on a number of occasions that the provisions of section 91(5) are not restricted in their application to allegations made under provisions of the Act pertaining to improper or illegal treatment of individuals. In *Domtar* the Board found that allegations made under what is now section 65 of the Act could attract the effect of the reverse onus provisions of the Act notwithstanding the absence of language in the provisions of 65 that speak of individual, as distinct from union rights. Rather than first looking to the section of the Act that is being alleged to have been violated to determine the applicability of section 91(5), the Board will "factually" assess the allegations made pursuant to those sections to determine whether the allegations trigger the provisions of section 91(5). (*Domtar, supra*, par. 7.) Similarly, in *Wilco-Canada Inc.*, [1983] OLRB Rep. Jan. 165 the Board further opined that there is nothing to prevent the reverse onus provisions attaching to allegations involving the violation of the statutory freeze provided that the factual basis of the union's case is that terms and conditions of employment of employees or a group of employees are altered in a manner that is contrary to the Act. (See also *Polish Alliance Friendly Society of Canada* [1984] OLRB Rep. Feb. 349 par. 15.)

42. Given our focus on the factual basis of the allegations, it is unnecessary to determine at this point the extent to which the reverse onus provisions of the Act apply to the specific allegations made by the trade union. It is sufficient at this point to note that the factual basis of the allegations regarding at least one of the sections of the Act pleaded, (namely, section 67) clearly falls within the ambit of section 91(5), and that the facts giving rise to that allegation encompass the entire process of re-organization as described above. The Board declines to make a ruling at this juncture concerning the applicability of the reverse onus provisions with respect to the allegations pursuant to sections 15 and 81. Counsel may address the issue of the location of the legal burden of proof with respect to those allegations in final argument.

ii.) Remainder of the Allegations

43. The remainder of the allegations of fact in the trade union's pleadings is either integrally related to, or largely ancillary to the facts concerning the matters that do attract the reverse onus provisions of the Act. To the extent that other factual issues arise which may not be covered by the provisions of section 91(5) (such as the disparate treatment of bargaining unit employees compared to the treatment of the six reclassified employees, and more generally, the facts related to the bad faith bargaining issues advanced by the union), they are in our view collateral to the central factual issue concerning the circumstances, motives, and effects of the reassignment of the six persons in question.

iii.) Employer has Peculiar Knowledge of Circumstances

44. Moreover, given that the core allegations relate to the employer's decision to change the alleged status quo shortly after the certification, the employer is in a peculiarly advantageous position to address, assess and present such evidence. Although this would necessarily entail the employer leading evidence in chief with respect to matters concerning which it may not shoulder the legal onus, in our view the employer's access to this information would substantially facilitate the efficient litigation of this matter if it proceeds first.

iv.) Procedural Prejudice Created by Requiring Employer to Proceed First

45. Finally, we are not convinced that requiring the employer to proceed first with its evidence would create such a hardship upon the employer as to override the other considerations militating in favour of such a procedure. Counsel for the employer did not raise any specific form of prejudice, such as the unavailability of witnesses, the irretrievable loss of evidence, the inherent unknowability of the evidence, etc., that his client may encounter as a result of proceeding first. Rather, the submissions at the hearing were largely based upon its contention of a complete lack of understanding of the legal and factual basis upon which the trade union advances its case. In this respect, we have ruled that the trade union has presented a *prima facie* case with respect to each of its allegations and that its particularization of those allegations is sufficient to permit it to proceed with its case. Accordingly, we do not consider these to be factors giving rise to significant prejudice. Counsel for the employer also made reference to the general unfairness created by requiring the party accused of unfair labour practices to proceed first, thereby allowing the applicant the opportunity to build its case in cross-examination. In our view, to the extent that the Act provides a reverse onus, the Legislature clearly intended a responding party to proceed first with its evidence, with the inescapable consequence that the applicant might therefore be enabled to make out some or all of its case in cross-examination. As indicated above, the substantial majority of the allegations concern matters covered by section 91(5), and to the extent that the applicant is in a position to make out its case in cross-examination, this would appear to be specifically contemplated by the Act. Even here, however, the scope of cross-examination will not be entirely unbridled so as to allow the applicant an unfair advantage. Aside from the application of the general rules of evidence restricting the scope of cross-examination, such as the collateral evidence rule, the applicant may be restricted from raising in cross-examination factual matters that have not been pleaded in its application and that do not otherwise arise in the evidence led by the employer. (In this respect, see *Morrison's Meats Packers Ltd.*, [1993] OLRB Rep. Mar. 226)

46. Finally, any disadvantage occasioned by being required to proceed first in this proceeding is ameliorated to a considerable extent by the acquisition of the right to present reply evidence. Although we have ruled that the pleadings of the applicant are sufficient both with respect to the legal and factual content, we note that the basic theory of the case presented by the applicant may raise issues that are novel. In light of this, at the hearing we informed the parties that the employer

would be provided with ample scope for reply to evidence presented by the applicant should the employer be surprised by the nature or the direction of the applicant's case. In such an event, the parties may seek further rulings from the Board on the matter.

47. Accordingly, subject to our determination of those matters set out in our decision of July 16, 1993, the hearing will commence on the next scheduled hearing date with the employer presenting its evidence first on all aspects of the case.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; July 19, 1993

Notwithstanding our ruling with respect to particulars, given the board nature of the allegations I would have required the applicant to lead evidence first.

0845-93-M Amalgamated Transit Union Local 616, Trade Union v. Transit Windsor, Employer

Constitutional Law - Reference - Municipal bus operation primarily intraprovincial, but extra-provincial bus transportation services making up continuous and regular part of the operations - Board advising Minister that bus operation's labour relations falling within federal jurisdiction

BEFORE: *R. D. Howe*, Vice-Chair, and Board Members *J. A. Ronson* and *J. Redshaw*.

DECISION OF THE BOARD; July 15, 1993

1. This is a reference from the Minister of Labour to the Board under section 109 of the *Labour Relations Act*, the material part of which provides:

109(1) The Minister may refer to the Board any question which in his or her opinion relates to the exercise of his or her powers under this Act and the Board shall report its decision on the question.

2. The reference reads as follows:

THE LABOUR RELATIONS ACT

IN THE MATTER OF REFERENCE FROM THE MINISTER TO
THE ONTARIO LABOUR RELATIONS BOARD PURSUANT
TO SECTION 109 OF THE ACT REGARDING A REQUEST BY A
UNION FOR THE APPOINTMENT OF A CONCILIATION OFFICER
PURSUANT TO SECTION 16 OF THE ACT

AMALGAMATED TRANSIT UNION LOCAL 616
("THE UNION")

- AND -

TRANSIT WINDSOR
("THE COMPANY")

1. Pursuant to Section 16 of the Act, the Union requested the appointment of a Conciliation Officer in respect of the Company. The Company objects to this request.
2. The Company objects on the basis that the Minister of Labour is without jurisdiction to appoint a conciliation officer as Transit Windsor is a federal work or undertaking.
3. A labour affairs officer from Labour Canada has advised the Company that it falls within federal jurisdiction for labour relations purposes.
4. The Union asserts that the labour relations matters between the parties fall within provincial jurisdiction and that the parties have operated under provincial jurisdiction for the past eighty years.
5. The Minister is of the opinion that the circumstances surrounding the request by the Union raise a question as to his authority to appoint a Conciliation Officer. Accordingly, the following question is referred to the Board for its advice:

Do the labour relations matters between the parties fall within federal or provincial jurisdiction?

• • • •

8. Attached are the copies of the following documents:

Request for the Appointment of a Conciliation Officer dated April 12, 1993

Collective Agreement dated March 1, 1991

Letters dated April 20 and 27, 1993 from Patrick F. Milloy (Company counsel)

Letter dated May 13, 1993 from Ronald E. Seguin (Union President)

"Bob Mackenzie"
Bob Mackenzie
MPP Hamilton East
Minister of Labour

[Paragraphs 6 and 7, which specify the parties' names and addresses, have been omitted]

3. A hearing in respect of this matter was scheduled for July 7, 1993. However, that hearing did not proceed in view of the parties' agreement which was set forth as follows in a letter dated July 6, 1993 from Company counsel to the Board's Registrar:

Further to my telephone conversation with you earlier this afternoon, I write to confirm, on behalf of our client, Transit Windsor, that the parties herein are agreed as follows:

1. The hearing scheduled to be held on July 7, 1993, is to be cancelled.
2. The O.L.R.B. is to proceed to determine whether Transit Windsor is or is not a "federal work, undertaking or business" as defined in the Canada Labour Code and hence, whether Transit Windsor is subject to the provisions of the Canada Labour Code or is subject to the provisions of the Ontario Labour Relations Act; and
3. In making the determination referred to in paragraph 2 above, the O.L.R.B. is to proceed without a formal hearing and is to decide the matter on the material filed in this matter by Transit Windsor.

Please note that a copy of this letter is being sent to Mr. Falzone, Union counsel, who has authorized us to advise you of his and his client's agreement to the foregoing.

We had prepared a Book of Authorities for use at the hearing on July 7 next. We will forward three copies of the Book of Authorities under separate cover by ordinary mail for the use of and the assistance of the panel which will consider this matter. We will send a copy to Mr. Falzone as well.

The parties are anxious to have a determination made herein as soon as possible and we request that you communicate this fact to the panel which will be requested to consider this matter.

We await receipt of a Decision from the O.L.R.B.

Yours very truly,

"Leonard P. Kavanaugh"

4. The material filed in this matter by the Company consists of the following statement of representations, the four documents listed in Appendix "A" thereto, and a Book of Authorities containing sections 91 and 92 of the *Constitution Act, 1867*, sections 1-4 of the *Canada Labour Code*, and *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 729 et al.* (1983), 44 O.R. (2d) 560 (C.A.):

STATEMENT OF REPRESENTATIONS OF TRANSIT WINDSOR

1. Transit Windsor, formerly the Sandwich, Windsor & Amherstburg Railway Company, is a corporation incorporated pursuant to the provisions of the *Sandwich, Windsor & Amherstburg Railway Act, 1930*, S. O. 1930, c. 17, as amended.
2. In 1970, the above *Act* was amended and the right to operate a public transportation system in the City of Windsor was vested in the City of Windsor. By City of Windsor By-Law for [sic] 4676, dated October 29, 1973, Transit Windsor was authorized to "operate and manage a system of public transportation in the City of Windsor." In addition, Transit Windsor continued to operate charter buses to various locations in the United States and provided bus transportation to special events in the Detroit area, such as Detroit Tiger and Red Wing games.
3. On February 21, 1979, and in anticipation of the fact that Transit Windsor would commence operating a daily bus service to Detroit, Michigan through the Detroit-Windsor Tunnel effective in 1981, Transit Windsor incorporated a corporation known as Windsor Chartabus Inc. That corporation was and remains a wholly owned subsidiary of Transit Windsor.
4. By an Agreement dated May 20, 1980, between Transit Windsor and Windsor Chartabus Inc., Transit Windsor transferred and assigned to Windsor Chartabus Inc. its extra-provincial bus operations and assigned to Windsor Chartabus Inc. Transit

Windsor's Ontario Ministry of Transportation Extra-Provincial Operating Licence and Interstate Commerce Commission (U.S.) Operating Certificate.

5. Thereafter, Windsor Chartabus Inc. operated the extra-provincial bus service which was previously operated by Transit Windsor, except for charter bus service into the United States, which service continues to be operated by Transit Windsor directly.
6. Windsor Chartabus Inc. does not have any employees or premises separate from those of Transit Windsor. Windsor Chartabus Inc. is managed by Transit Windsor and utilizes Transit Windsor bus operators for all of its operations.
7. Transit Windsor and Windsor Chartabus Inc. maintain a common fleet of some 100 buses, all of which carry the Transit Windsor logo. In fact, Windsor Chartabus Inc. owns 18 of these buses. Notwithstanding the different ownership, buses owned by Windsor Chartabus Inc. are used for Transit Windsor operations in the City of Windsor and for extra-provincial service. Buses owned by Transit Windsor are utilized in the same manner.
8. At the present time, Windsor Chartabus Inc. operates a regularly scheduled tunnel bus service comprised of approximately 235 round trips per week. On a daily basis, five to six of Transit Windsor's 149 bus operators are assigned to operate the tunnel bus service.
9. Windsor Chartabus Inc. also provides bus transportation to the Detroit area for special events (Tigers and Red Wings games, the Grand Prix, Autoshow, etc.). This special events service involves approximately 1500 round trips into United States each year.
10. The extra-provincial service referred to above takes up approximately 3% of the total yearly Transit Windsor bus operator working hours.
11. By letter dated June 24, 1992, Labour Canada advised Transit Windsor that it had determined that both Transit Windsor and Windsor Chartabus Inc. are federal works or undertakings.
12. The Union has been the bargaining agent for Transit Windsor's bus operators, mechanics and certain related classifications for in excess of 60 years. In addition, by way of a Certificate dated August 26, 1991, the Ontario Labour Relations Board certified the Union as the bargaining agent for certain of Transit Windsor's full-time office and clerical employees. Transit Windsor and the Union were parties to a Collective Agreement covering the terms and conditions of employment of the above employees, which Collective Agreement had a term of operation from March 1, 1991 to and including February 28, 1993.
13. By letter dated September 16, 1992, Transit Windsor advised the Union that "[I]f we are and remain a Federal undertaking, our position is that, under the *Canada Labour Code*, we currently have a Collective Agreement and that the Amalgamated Transit Union, Local 616, is the bargaining agent.
14. By Certificate dated May 11, 1993, the Ontario Labour Relations Board certified the Union as a bargaining agent for certain of Transit Windsor's part-time office and clerical employees.
15. The parties are currently engaged in negotiations to replace the expired Collective Agreement referred to above.
16. A list of the relevant documents being submitted with these Representations is set out at Appendix "A" attached hereto.
17. It is the position of Transit Windsor that the undertaking operated by it falls within federal jurisdiction pursuant to Section 92(10) of the *Constitution Act, 1867*, as a

transportation system that extends beyond the limits of the Province of Ontario. It is further submitted that to fall within federal jurisdiction, a transportation system need only provide regular and continuous service beyond the limits of a province.

18. It is the position of Transit Windsor that as it provides regular and continuous service beyond the limits of the Province of Ontario, its labour relations are governed by the provisions of the *Canada Labour Code* and as such, the Minister of Labour for Ontario has no jurisdiction to appoint a Conciliation Officer pursuant to the provisions of the Ontario *Labour Relations Act*.
19. It is also the position of Transit Windsor that a hearing is not required in this matter. However, Transit Windsor reserves the right to request a hearing upon review of the materials filed by the Union.

APPENDIX "A"

1. Letters patent and related documents re: Windsor Chartabus Inc.
2. Memorandum of Agreement between Transit Windsor and Windsor Chartabus Inc., dated May 20, 1980.
3. Letter dated June 24, 1992 to Transit Windsor from Labour Canada.
4. Letter dated September 16, 1992 to the Local 616, Amalgamated Transit Union from Transit Windsor.

5. The Union's position regarding the matter is set forth in the following letter dated May 13, 1993 from Ronald E. Seguin, its President/Business Agent, to a Ministry official, which letter constitutes one of the documents attached to the reference:

I have received your letter of May 4th 1993 regarding our request for the appointment of a Conciliation Officer to aid Amalgamated Transit Union Local 616 and Transit Windsor and its' [sic] ongoing negotiations for a new Collective Agreement.

Please be advised that our position in regards to this matter has not changed. Amalgamated Transit Union Local 616 has conducted its' [sic] business under Provincial Jurisdiction for the past eighty (80) years. The fact that we filed for assistance under the Ontario Labour Relations Board clearly indicated our position in regards to Jurisdiction.

I trust that this letter addresses the information you have requested and I await a decision with respect to this application.

6. That letter asserts that the Union has conducted its business under provincial jurisdiction for the past eighty years. However, as noted above, the parties have agreed that the Board is to decide this matter on the basis of the materials filed by Transit Windsor. Those materials indicate that the Union "has been the bargaining agent for Transit Windsor's bus operators, mechanics and certain related classifications for in excess of 60 years", but do not indicate how those bargaining rights (which pre-date the existence of the Board) were acquired. They also indicate that the Board issued certificates for certain of the company's full-time and part-time office and clerical employees on August 26, 1991 and May 11, 1993, respectively. However, it appears that this is the first occasion upon which the Board has been expressly called upon to consider whether labour relations matters between these parties fall within provincial or federal jurisdiction.

7. The constitutional law principles germane to this matter, and the leading cases which form the basis of those principles, are duly summarized in the following excerpts from pages 22-2 to 22-18 of Hogg, *Constitutional Law of Canada* (3rd Ed., 1992):

TRANSPORTATION AND COMMUNICATION

22.1 Distribution of Power

Legislative power over transportation and communication is divided between the federal Parliament and the provincial Legislatures. There is no mention of either transportation or communication in the Constitution Act, 1867, although several modes of transportation and communication are mentioned. The most important of these references occurs in s. 92(10). Section 92(10) is, of course, part of the list of provincial powers. It confers upon the provincial Legislatures the power to make laws in relation to:

Local works and undertakings other than such as are of the following classes: .

- (a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
- (b) Lines of steam ships between the province and any British or foreign country;
- (c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

The three listed exceptions from provincial power are heads of federal legislative power by virtue of s.91(29), which includes in the federal enumeration those classes of subjects which are expressly excepted from the provincial enumeration....

The essential scheme of s. 92(10) is to divide legislative authority over transportation and communication on a territorial basis. The specific references in s. 92(10)(a) to "lines of steam or other ships, railways, canals, telegraphs" do not allocate those modes of transportation or communication unqualifiedly to the federal Parliament. The references must be read in the context of the later reference to "other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province", and the whole of paragraph (a) must be read as an exception to the grant of provincial authority over local works and undertakings. The effect is to allocate to the federal Parliament the authority over *interprovincial* or *international* shipping lines, railways, canals, telegraphs and other modes of transportation or communication; and to allocate to the provincial Legislatures the authority over *intraprovincial* shipping lines, railways, canals, telegraphs and other modes of transportation or communication.

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22.2 Works and undertakings

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Section 92(10)(a) refers to "works and undertakings", while s. 92(10)(c) refers only to "works". This suggests a distinction between the two terms which has usually been ignored, but has occasionally been adverted to in the cases. It has been said that a work is a "physical thing", while an undertaking is "not a physical thing, but an arrangement under which ... physical things are used". The term "undertaking" is the one which has been most often invoked in the cases under s. 92(10)(a), and it seems to be equivalent to "organization" or "enterprise".

• • • •

23.3 Transportation and communication.

Section 92(10)(a) is confined to works and undertakings involved in transportation or communica-

tion. The general phrase “other words or undertakings connecting the province with any other”, etc., is to be read ejusdem generis with the specific examples which precede it, and the specific examples are all modes of transportation or communication. The word “connecting” in this context is to be confined to connections by transportation or communication.

• • • •

22.4 Connection with another province

According to s.92(10)(a), an undertaking in a province is within federal jurisdiction if it is an undertaking “connecting the province with any other or others of the provinces, or extending beyond the limits of the province”. The courts have held that the connection (or extension) that is contemplated by s.92(10)(a) is an operational connection, and not a merely physical connection...

22.5 Undivided jurisdiction

What is the appropriate classification of a business or group of associated businesses which is engaged in intraprovincial transportation or communication as well as interprovincial (or international) transportation or communication? Does one sever the intraprovincial part from the interprovincial part, and divide legislative jurisdiction accordingly? Or does one look to the dominant characteristic of the business and allocate legislative jurisdiction over the entire business according to whether the dominant characteristic is intraprovincial or interprovincial? We shall see that neither of these approaches has been adopted by the courts; instead, they have held that a business which is engaged in a significant amount of continuous and regular interprovincial transportation or communication is wholly within federal jurisdiction.

The courts early rejected the idea of dividing legislative jurisdiction over a single undertaking. In *Toronto v. Bell Telephone Co.* [[1905] A.C. 52], it was held that the Bell Telephone Company was an interprovincial undertaking within s. 92(10)(a). The Privy Council rejected the argument that the company’s long-distance business and its local business should be separated for the purpose of allocating legislative jurisdiction. Their lordships held that the company carried on “one single undertaking”, and that it fell within s.92(10)(a). Nor did their lordships embark on an inquiry as to which aspect of the company’s undertaking was dominant: the local or the long-distance. In fact, at the time of the litigation the company had not actually established any connections outside Ontario, and so the interprovincial connection, far from being the dominant feature of the business, was no more than a “paper connection”. But their lordships held that the mere fact that the company’s objects “contemplate extension beyond the limits of one province” sufficed to stamp the entire undertaking with an interprovincial character.

The same resistance to dual jurisdiction over transportation and communication undertakings is evident in *A.-G. Ont. v. Winner* [[1954] A.C. 541]. The question in that case was whether the province of New Brunswick had regulatory authority over a bus line which operated from the United States through New Brunswick, and into Nova Scotia. The bus line picked up and put down passengers at various points within New Brunswick; and the provincial highway board, purporting to act under statutory authority, sought to regulate (in fact, to prohibit) this part of the bus line’s business. The Supreme Court of Canada held that the province could not regulate an interprovincial or international journey, even if it began or ended in New Brunswick, but that the province could regulate the journeys which began and ended in New Brunswick without crossing a provincial border. The Privy Council reversed this holding, denying the province even the regulatory authority over the local journeys. The dual legislative authority contemplated by the Supreme Court would be acceptable only “if there were evidence that Mr. Winner was engaged in two enterprises; one within the Province and the other of a connecting character”. As it was, however, the same buses carried both the local and the long-distance passengers: the undertaking was “in fact one and indivisible”. Their Lordships therefore relied on the *Bell Telephone* case to hold that the entire undertaking was within federal jurisdiction.

The *Bell Telephone* and *Winner* cases established an important rule, which has been consistently reaffirmed in later cases, that a transportation or communication undertaking is subject to the regulation of only one level of government. Once an undertaking is classified as interprovincial,

all of its services, intraprovincial as well as interprovincial, are subject to federal jurisdiction. And, by the same token, once an undertaking is classified as local, all of its services, including any casual or irregular interprovincial services, are subject to provincial regulation. In this way, the courts have avoided the complications of divided regulation of a single undertaking. However, the one-undertaking-one-regulator rule loads all the freight on the initial question of classification (or characterization); everything turns on whether the undertaking is interprovincial or local. As Dickson C.J. commented in the *AGT* case [[1989] 2 S.C.R. 225, 257], the question of jurisdiction is “an all or nothing affair”.

22.6 Continuous and regular service

In *Winner*, as in *Bell Telephone*, their lordships did not inquire into the volume in dollars or passenger miles of Winner's local New Brunswick business, or make any attempt to compare it with the interprovincial and international business. In later cases, where this kind of information has been available, the courts have not shrunk from the implication of *Winner*, and especially *Bell Telephone*, that an interprovincial connection need not be the major part of the undertaking's activity in order to bring the undertaking within s. 92(10)(a). So long as the interprovincial services are a “continuous and regular” part of the undertaking's operations, the undertaking will be classified as interprovincial.

A good example of the “continuous and regular” rule is *Re Ottawa-Carleton Regional Transit Commission* [(1983) 44 O.R. (2d) 560 (C.A.)]. In that case, a municipal transit system serving the Ottawa area in Ontario operated some bus routes between Ottawa and Hull in Quebec. The bus routes to and from Quebec accounted for less than one per cent of the total distance travelled by the system's vehicles, and they carried only about three per cent of the system's passengers. This interprovincial service, although small in relation to the local service, was regularly scheduled, and the Ontario Court of Appeal held that it was “continuous and regular”. Therefore, the Court concluded that the transit system was an interprovincial undertaking, which meant that its labour relations (among other things) came within federal jurisdiction.

In the *Ottawa-Carleton* case, the interprovincial service was part of the transit system's regularly scheduled bus service. This supported the finding that the interprovincial service was “continuous and regular”. In the trucking business, there is typically no published schedule or other predetermined timetable: hauls are made as and when customers call for them. Even in this situation, Ontario courts have been willing to find that a small proportion of interprovincial business satisfied the “continuous and regular” rule. In *Re Tank Truck Transport* [[1960] O.R. 497 (H.C.); affd. without written reasons [1963] 1 O.R. 272 (C.A.)], it was held that a trucking company came within s.92(10)(a), although 94 per cent of its trips were confined to the province and only six per cent were to points outside the province. McLennan J. of the Ontario High Court, whose decision was affirmed by the Court of Appeal, held that the interprovincial connections were “continuous and regular”. In that case, there were interprovincial hauls to be made nearly every day. *Tank Truck* was followed in the *Liquid Cargo* case [(1965) 1 O.R. 84 (H.C.)], where another trucking business was held to be within s. 92(10)(a); although its interprovincial business comprised only 1.6 per cent of its trips and ten per cent of its mileage. Haines J. of the Ontario High Court held that the “continuous and regular” test was satisfied, despite the fact that as much as two to three weeks could go by between interprovincial hauls.

If the continuous and regular standard is not met, and the interprovincial service is held to be merely casual, then the undertaking will be classified as local (intraprovincial), which will place its activity within provincial regulatory jurisdiction. For example, in *Agence Maritime v. Canada Labour Relations Board* [[1969] S.C.R. 851], vessels plying coastal ports within Quebec made three trips outside the province over a period of two years. The shipping company was held to be within provincial labour relations jurisdiction.

There is one qualification which must be made to the rule that “continuous and regular” interprovincial service constitutes an interprovincial connection within the meaning of s. 92(10)(a). The rule will not apply to a carrier who artificially organizes its business so as to acquire an interprovincial connection, for example, by unnecessarily detouring across a provincial border or by unnecessarily locating a terminal just across a border. Such a “subterfuge” or “camouflage” will be disregarded by the courts in determining whether or not the undertaking is really interprovincial. As the Privy Council said in *Winner*: “The question is whether in truth and in

fact there is an internal activity prolonged over the border in order to enable the owner to evade provincial jurisdiction or whether in pith and substance it is interprovincial". This is, of course, the familiar colourability doctrine applied to interprovincial undertakings.

22.7 Related undertakings.

(a) Common ownership

The decisions in *Bell Telephone, Winner, Ottawa-Carleton, Tank Truck* and *Liquid Cargo* were each premised on the finding that the company (or individual) was engaged in one indivisible undertaking. But a company may engage in more than one undertaking, in which case that company's operations may become subject to dual legislative authority. The fact that various business operations are carried on by a single proprietor does not foreclose inquiry as to whether or not those operations consist of more than one undertaking for constitutional purposes. It is the degree to which the operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not.

• • • •

The inconclusiveness of ownership works in both directions. Just as one proprietor may own and operate two separate undertakings, so two (or more) proprietors may own and operate different parts of a single undertaking. A business which, regarded by itself, is entirely local may be so closely tied into another business which is interprovincial that the two businesses will be classified as forming a single interprovincial undertaking. There are two situations in which a local undertaking will be treated for constitutional purposes as part of a separately-owned interprovincial undertaking. One (common management) is where the two undertakings are managed in common as a single enterprise. The other (dependency) is when the interprovincial undertaking is dependent on the local undertaking for the performance of an essential part of the interprovincial transportation or communications services....

22.9 Transportation by land

Legislative jurisdiction over transportation by land depends upon the principles explained in the previous sections of this chapter. Jurisdiction over trains, buses, trucks, taxis, limousines, pipelines, and electricity transmission lines depends primarily on whether they are operated as part of an interprovincial (or international) undertaking, in which case jurisdiction is federal under s.92(10)(a), or whether they are operated as part of an intraprovincial undertaking, in which case jurisdiction is provincial under s.92(10)(c)....

8. Applying those principles to the facts of the instant case leads the Board to conclude that labour relations matters between the Union and the Company fall within federal rather than provincial jurisdiction, for the following reasons.

9. It is apparent from the facts set forth above that the operations of Transit Windsor and its wholly owned subsidiary, Windsor Chartabus Inc., are highly integrated. Windsor Chartabus Inc. does not have any employees or premises separate from those of Transit Windsor. It is managed by Transit Windsor and utilizes Transit Windsor bus operators for all of its operations. Transit Windsor and Windsor Chartabus Inc. maintain a common fleet of one hundred buses, all of which carry the Transit Windsor logo. Although Windsor Chartabus Inc. owns eighteen of those buses, the buses owned by Windsor Chartabus Inc. are used for Transit Windsor operations in the City of Windsor and for extra-provincial service. The same is true of buses owned by Transit Windsor. Thus, it is clear that Transit Windsor and Windsor Chartabus Inc. are engaged in a single indivisible undertaking (and that they could appropriately be declared to constitute a single employer, pursuant to section 1(4) of the *Labour Relations Act*, if they fell within the ambit of provincial jurisdiction for labour relations purposes).

9. Although the bulk of the undertaking's bus transportation services are intraprovincial,

extra-provincial bus transportation services are also a continuous and regular part of the undertaking's operations. As noted above, those operations include regularly scheduled bus service between Windsor, Ontario and Detroit, Michigan, through the Detroit-Windsor Tunnel, involving approximately 235 round trips per week and five or six of Transit Windsor's 149 bus operators. The undertaking's operations also include approximately 1500 bus transportation round trips each year between Windsor and the Detroit area for special events such as Detroit Tigers and Detroit Red Wings games, the Grand Prix, and the Autoshow. The undertaking also provides charter bus service into the United States.

10. Although the aforementioned extra-provincial services take up only about 3% of the total yearly Transit Windsor bus operators' working hours, they are clearly a "continuous and regular" part of the undertaking's operations. In this regard, there are no material distinctions between the instant case and the *Ottawa Regional Transit Commission* case, *supra*, in which the Ontario Court of Appeal held that although the bus routes operated by the Commission between Ottawa and Hull involved less than one per cent of the total distance travelled by the system's vehicles and carried only about three per cent of the system's passengers, that regularly scheduled interprovincial service was "continuous and regular". Thus, we are compelled by the applicable constitutional jurisprudence to conclude that the transit system operated by the Company (through Transit Windsor and its wholly owned subsidiary, Windsor Chartabus Inc.) is an undertaking whose labour relations fall within federal rather than provincial jurisdiction.

11. For the foregoing reasons, the Board hereby advises the Minister that the labour relations matters between the parties fall within federal jurisdiction.

0730-93-R Randy A. Burke, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 127 ("the union"), Responding Party v. **Venture Industries Canada, Ltd.**, ("the company" or "the employer"), Intervenor

Practice and Procedure - Termination - Timeliness - Board exercising its discretion under section 105(2)(i) to refuse to entertain second termination application made by applicant within period of a few weeks - Application dismissed - Applicant also barred from filing new termination applications for a period of six months

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members W. H. Wightman and D. A. Patterson.

APPEARANCES: Randy A. Burke, Rob Caron, Pam Griffore, Cindy Lucier, Louise Dodman, Marlene Delorme and Lino Toscani for the applicant; Michelle McPhee, Dan Flynn, C. Charlton, T. Hart, B. Tremblay and C. Formosa for the responding party; Anna Vannelli, Francine LeBlanc and Patrick M. Melady for the intervenor.

DECISION OF THE BOARD; July 28, 1993

I

1. This is an application for a declaration terminating the bargaining rights which the union currently holds for a bargaining unit described as follows:

all regular plant employees [of Venture Industries Canada, Ltd.] at its plant location, Wallaceburg, Ontario, save and except foremen, persons above the rank of foreman, office staff and sales staff, and students employed during the summer vacation period.

The application is made by Randy Burke on his own behalf and on behalf of a number of his fellow employees who have signed a petition signifying their opposition to the union. The application was filed on May 28, 1993.

2. A hearing in this matter was held, in Toronto, on June 28, 1993. Mr. Burke appeared on his own behalf. The other parties appeared by counsel. At that hearing the parties addressed what was described as a "preliminary issue", and following argument, the Board reserved its decision. The provisions of the *Labour Relations Act* to which reference should be made are as follows:

58.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(j.1) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

* * *

105.-(1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

3. The "preliminary issue" concerns the exercise of the Board's discretion under section 105(2)(i), and whether, in all the circumstances, this particular application should be entertained.

4. The union urged the Board to exercise its discretion under section 105(2)(i) of the Act

not to entertain this application, because this is the second termination application that Mr. Burke has filed within a period of a few weeks, and it follows yet another termination application, by other employees, which was dismissed after a representation vote. The union points out that Mr. Burke's present termination application is the third one before the Board in recent months and was filed barely three days after his earlier termination application was dismissed by another panel of the Board. In the union's submission, this panel of the Board should endorse both the reasoning and result reached by the other panel (which released its reasons for decision on June 7, 1993) [now reported at [1993] OLRB Rep. June 572], and should dismiss the new termination application as well. The union described Mr. Burke's multiple applications as an "abuse of process", which has generated costs for the parties and the public, and has interfered with the process of collective bargaining.

5. Mr. Burke and the company both urged the Board to entertain this application "on its merits" - that is, to hear such evidence as was necessary to determine whether the document filed in support of the application represented the voluntary wishes of at least forty-five per cent of the employees in the bargaining unit, and, if the Board found that it did, to direct the taking of a representation vote. They argued that another representation vote is necessary to clear the air, and finally resolve whether the company's employees wish to be represented by the CAW. In their submission, previous termination applications have not really settled that issue.

6. In order to appreciate the context in which the present termination application arises, it may be useful to sketch in some background.

7. It will be convenient to review events in chronological order.

II

8. The union was certified to represent the company's employees on March 15, 1989 after protracted hearings before the Board (some 15 days). The certification decision is reported at [1989] OLRB Rep. Oct. 1074.

9. Following the union's certification, the union and the company met and attempted to bargain a collective agreement. They were not successful, and, in consequence, the union applied to the Board under section 40a of the Act (now section 41, as amended) for a direction that a first contract be settled by arbitration. As the law then stood, that process involved two phases: an initial hearing to determine whether the applicant union was *entitled* to have a collective agreement arbitrated, and, if the union was successful in that regard, a separate arbitration proceeding to determine the actual terms of the collective agreement.

10. The first hearing phase consumed six days, and on March 27, 1990 the Board directed the arbitration of a first contract. The Board found that collective bargaining had been unsuccessful because the company's bargaining position was unreasonable, provocative, uncompromising, and without reasonable justification. The Board's reasons are reported at [1990] OLRB Rep. Aug. 904.

11. In a related decision dated May 31, 1990 [now reported at [1990] OLRB Rep. May 625], the Board dismissed an application by Mr. Burke to terminate the union's bargaining rights. Mr. Burke's application for a stay of that decision was dismissed by the Ontario Court General Division on June 21, 1990 [now reported at [1990] OLRB Rep. June 748]. The application for judicial review of the Board's decision was later abandoned.

12. On June 19 and June 20, 1990 a differently-constituted panel of the Board considered

the second phase of the “first contract arbitration” procedure: the actual arbitration of the terms of the collective agreement. What transpired at that arbitration hearing is set out in the Board’s decision of July 23, 1990 [now reported at [1990] OLRB Rep. July 809]. For present purposes, we need only note that this arbitration process yielded a two-year collective agreement, which expired on June 22, 1992. Accordingly, in the Summer of 1992 the union and the employer were obliged, once again, to return to the bargaining table, bargain in good faith, and make every reasonable effort to reach a (second) collective agreement (see sections 54, 55 and 15 of the Act).

13. Notice to bargain was given by the union on June 16, 1992, and three bargaining meetings were scheduled: July 9, 1992, August 14, 1992, and August 19, 1992. But on August 13, 1992 certain employees made application to terminate the union’s bargaining rights (Board File 1446-92-R hereinafter referred to as the “Griffore-Lucier” termination application). In view of the termination application, the union and the company decided to suspend bargaining, pending resolution of this challenge to the union’s status as bargaining agent. Unfortunately, that resolution took some time.

14. The initial processing of the termination application moved relatively expeditiously, and on September 3, 1992, the Board directed that a representation vote be taken. Voters were asked to indicate, by secret ballot, whether or not they wished to continue to be represented by the union. Section 58(4) of the Act reads as follows:

58.-(4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

Accordingly, in order for the termination application to succeed, *more than* fifty per cent of the ballots cast had to be cast in opposition to the union.

15. There followed a dispute about the eligibility of certain individuals to cast ballots. That dispute, in turn, prompted hearings in Windsor, as well as an exchange of written representations. Following those hearings and representations, the Board made two determinations: a decision dated March 5, 1993 ruling on voter eligibility; and a further decision dated April 21, 1993 declining to reconsider those rulings, and dismissing the Griffore-Lucier termination application.

16. Again, the Board’s reasons for its various rulings speak for themselves and need not be repeated here. It suffices to say that on the basis of the ballots cast and counted, the Griffore-Lucier termination application was dismissed. As it turned out, the result of the representation vote was a “tie”: the objecting employees were not able to establish sufficient employee opposition to require termination of the union’s bargaining rights. But the result was as close as it could possibly be. The union’s status as bargaining agent was confirmed, but there was obviously a significant component of the employees who were dissatisfied with that situation.

17. On April 15, 1993 the company and the union met to bargain for a new collective agreement. This was their first meeting in about eight months; however, at the time it was held, the company’s request for reconsideration of the voter eligibility rulings was still pending before the Board, and, as we have already noted, it was not until 6 days later, on April 21, 1993, that the reconsideration application was dealt with, and the Griffore-Lucier application was formally dismissed. Furthermore, on May 6, 1993 the company made a further request for reconsideration which was not ultimately disposed of until June 21, 1993. In other words, the spectre of the Griffore-Lucier termination application, although dismissed on April 21, 1993, was still in the background of any bargaining undertaken during this period.

18. But the Griffore-Lucier termination application was not the only one in the background. On April 15, 1993 Mr. Burke filed his own application for termination of the union's bargaining rights (Board File 0182-93-R - "the April application"). This application, therefore, was filed on the same day that the union and employer returned to the bargaining table after an eight-month hiatus, and *before* the Griffore-Lucier termination application had been finally disposed of.

19. Pursuant to section 105(2)(c) of the Act, the Board might have simply refused to entertain Mr. Burke's April application. It did not. Instead, it postponed consideration of his application until the earlier one had been disposed of, and set the new matter down for hearing.

20. Mr. Burke's April termination application came on for hearing before the Board on May 25, 1993. After receiving the parties' representations, the Board ruled, orally, that it would exercise its discretion under section 105(2)(i) of the Act not to entertain the matter. The Board's reasons for its determination were reduced to writing and released on June 7, 1993.

21. On May 26, 1993 the union applied to the Minister of Labour for the appointment of a Conciliation Officer to assist the bargaining parties to negotiate a collective agreement. By that point, there had already been two recent termination applications, both of which had been dismissed: the Griffore-Lucier application which was dismissed on April 21, 1993, and Mr. Burke's April 15 application which was dismissed, orally, on May 25, 1993.

22. On May 28, 1993 Mr. Burke mailed a new termination application to the Board (Board File 0730-93-R). That application is similar to the one that had been dismissed three days before, and was received by the Board on June 1, 1993. It is that "new" application which is currently before us.

23. By letter dated June 1, 1993 Patrick Melady, a representative of the company, wrote to the Minister of Labour to object to the union's request for the appointment of a Conciliation Officer:

Please be advised that Venture Industries (Canada) Limited objects to the appointment of a Conciliation Officer in the matter of the renewal of a collective agreement between Venture (Canada) Limited and CAW-Canada and it's [sic] Local 127.

There are outstanding one or more applications to terminate the bargaining rights of the trade union. Those applications have been made by employees and have had sufficient support to warrant at least one representation vote. The result of that vote indicated that the Union does not have a majority support in the bargaining unit.

Finally I did not receive this notice until May 31, 1993.

24. It is not clear what termination application(s) the company is referring to because, by that time, the Griffore-Lucier application and Mr. Burke's first (April) application had both been dismissed (although a second request for reconsideration of the former decision was still outstanding), and notice of Mr. Burke's latest application (received by the Board on June 1, 1993) had not yet been sent to the employer. But, whatever Mr. Melady was referring to, it is evident that, in the company's view, an outstanding termination application was sufficiently significant for the negotiating process, that it was inappropriate for the Minister to appoint a Conciliation Officer to assist the bargaining parties in their efforts to negotiate a collective agreement. The union's response to the Ministry reads as follows:

I am writing in response to your letter dated June 8, 1993, and Mr. Patrick Melady's letter dated June 1, 1993.

Since July of 1992, the Union has attempted to get this Company to enter into serious collective bargaining in order to achieve a collective agreement. We have only met on four occasions; however, the Company has never entered into serious bargaining and it is my opinion that the Company feels they do not have to as long as there is an application filed to terminate bargaining rights.

There have been two applications filed to terminate bargaining rights and both have been heard by the Ontario Labour Relations Board. I have enclosed a copy of both decisions for your review.

The Union wants to enter into serious, uninterrupted bargaining with this Company and I feel that only with the appointment and the assistance of a Conciliation Officer this can be achieved. Failure of an appointment, I feel, will only cause further delay of the bargaining process.

25. On June 21, 1993 the Board issued another decision denying the company's second request for reconsideration of the Griffore-Lucier termination application. That decision should have been received by the bargaining parties, a few days later, in the ordinary course of the mails.

26. On June 21 the Minister advised the bargaining parties that he would soon be appointing a Conciliation Officer to confer with them and endeavour to effect a collective agreement. The appointment of a conciliation officer triggers a statutory bar to any new certification or termination application (see section 62 of the Act). The Act recognizes that assisted bargaining would be impeded by a challenge to the union's status as bargaining agent - a judgement which the bargaining parties also made when they decided to suspend bargaining pending disposition of the Griffore-Lucier termination application.

27. On June 22, 1993 the union and the company met for the purpose of collective bargaining. Their efforts in that regard were not successful. According to Mr. Melady, the company tabled its "final" proposal which the union rejected, and the company was not prepared to accept the union's counter-proposal. At that point, of course, the bargaining parties would not have received the Board's decision of June 21 respecting the second request for reconsideration of the Griffore-Lucier termination application, and the hearing in Mr. Burke's second termination application (the one now before us) was scheduled for June 28, about a week later.

28. At the hearing on June 28, 1993 Mr. Burke reiterated the concerns that he had raised at the hearing before the other panel of the Board. In Mr. Burke's submission, the Griffore-Lucier termination application had not settled anything, the first vote was inconclusive, and there should be another one.

29. Mr. Burke indicated that he was satisfied with the wages and working conditions offered by the company, and was worried about the possibility of a strike. He said that he was displeased about the amount of bargaining information he had received from the union, since there had been only two bargaining sessions and both had taken place in the shadow of various termination applications. It is not entirely clear what Mr. Burke was referring to, but, in any event, he was unhappy about the quality of the union's communications and concerned that: "it's been all this time and there has been no negotiations" - a concern which, ironically, was also echoed by the union. Mr. Burke told the Board that it was obvious to him that the company was not going to sit down and negotiate a collective agreement with the union: it did not do so for the first collective agreement, and he doubted that it would do so this time.

30. Mr. Burke indicated that he was prepared to call evidence to support the voluntariness of the petition opposing continued representation, and urged the Board to receive that evidence and direct another representation vote. Mr. Burke told the Board that he felt compelled to keep filing new termination applications until the Board ordered a new vote.

31. Mr. Burke and the company both pointed out that with the recall of certain employees from lay-off, the composition of the workforce was somewhat different than it had been in September 1992 when the last representation vote was taken.

III

32. As we have already mentioned, the application for termination now before us was filed barely three days after the dismissal of an earlier application filed by Mr. Burke; and if the present application is not identical to the earlier one, it is, at least, substantially similar. In the circumstances, we do not think it is necessary to review the various cases or principles that the Board has considered to be applicable to the application of section 105(2)(i). These matters have already been canvassed at paragraph 13 of the earlier Board decision of June 7, 1993. After reviewing a number of Board decisions interpreting section 105(2)(i), the Board went on to say:

14. As the Board pointed out in *Cara Operations Limited, supra*, the legislative scheme of the *Labour Relations Act* attempts to balance employee wishes with respect to representation and collective bargaining stability. In this case, collective bargaining between the CAW and the intervenor began in a timely manner. There was no suggestion that anything unusual had occurred in that respect before it was interrupted, relatively early in the collective bargaining process, by the first termination application, or that there was anything wrong with suspending that collective bargaining pending the disposition of the first application. It was apparent that all concerned expected that the first application would be dismissed before the Board decision in that respect actually issued. The CAW and the intervenor resumed bargaining on April 15, 1992 and this application was filed on the same day, six days before the Board dismissed the first application. The ability of the CAW and the intervenor to engage in collective bargaining was again impaired, even before the first application had been formally disposed of. It was readily apparent that the CAW and intervenor have not had a reasonable opportunity to bargain a new collective agreement.

15. On the other hand, the employee wishes with respect to representation were tested in the first application. That application was dismissed because the applicants for termination lost the vote. Although the vote result in the first application suggests that the CAW enjoys something less than their enthusiastic support, the bargaining unit employees have had a full opportunity to express their wishes. Further, the fact that there has been a change in the actual composition of the bargaining unit does not constitute a special or exceptional circumstance which justifies retesting the employee wishes so soon after the first application was dismissed. Employees who have just entered or re-entered a bargaining unit must take the situation as they find it. It would be unrealistic and unduly disruptive to collective bargaining to require a trade union to establish that it enjoys the support of the bargaining unit it represents every time there is a change in the employees who make up that bargaining unit.

16. In the result, the Board was satisfied that the CAW should have an opportunity to pursue collective bargaining and that it was appropriate for the Board to exercise its discretion not to entertain this application (which discretion we were satisfied the Board has for the reasons given in *Browning-Ferris Industries Ltd., supra*). The application was therefore dismissed as aforesaid.

17. However, the Board was not satisfied that it could or should bar either this or other bargaining unit employees from making a further termination application. For the reasons given in the *Blue Cross* case (*supra*, at paragraph 28), the applicant herein is not an "unsuccessful applicant" for the purposes and within the meaning of section 105(2)(i) of the Act. Nor are bargaining unit employees other than the actual applicants in the first application. Further, and in the alternative, we were not satisfied that it would be appropriate to impose a bar where, as in this case, the employees have been without a collective agreement for nearly a year. While the CAW is entitled to an opportunity to bargain, it and the intervenor may not be entitled to the same luxury of time which they may have enjoyed in July and August, 1992.

18. It may be that a further termination application will be filed. Certainly, the CAW is on clear notice that there is dissatisfaction in this bargaining unit. Whether the Board will entertain any subsequent termination application will depend on the circumstances, including when it is made

and what has transpired in the interim. It would be inappropriate for us to make any further comment in that respect.

33. We agree with these comments. We also note that the observation in paragraph 18 was prescient: a new application (this one) was on its way to the Board immediately after Mr. Burke's first application was dismissed.

34. In our view, the opportunity to pursue collective bargaining mentioned in paragraph 16 of the earlier panel's decision has never occurred; and as Mr. Melady's objection to conciliation clearly indicates, the prospect of one or more termination applications was a continuing factor in the bargaining. The inconclusive bargaining meeting on June 22, 1993 took place under the shadow of the present application scheduled to come on for hearing a week later, and perhaps the company's second request for reconsideration of the April 21 decision which, from the company's perspective, remained outstanding. Accordingly, it is hardly surprising that bargaining has not been very successful. It has been delayed and impeded, from the outset, by layers of litigation. Indeed, the spectre of one or more termination applications has haunted the bargaining process since August 1992, when the parties were scheduled to bargain what, for them, would be their first freely-negotiated collective agreement.

35. One of the purposes of the Act is to encourage the process of collective bargaining, so as to enhance the employees' ability to negotiate their terms of employment, and introduce a modicum of democratic participation into the workplace. With that statutory objective in mind, it is difficult to be sanguine about the collective bargaining relationship here. Despite the statutory duty to bargain in good faith, the first round of collective bargaining was frustrated by company conduct so corrosive to the negotiating process that the Board directed the arbitration of a first collective agreement - conduct which, in Mr. Burke's mind at least, was indicative of how the company would approach the second round of bargaining. The second round of bargaining was derailed, almost immediately, by successive and overlapping termination applications, which left the union uncertain, and the employees in limbo, while these matters played themselves out before the Board. That process took some months.

36. That is hardly an atmosphere likely to be conducive to bargaining, and one can readily understand Mr. Burke's frustration, as well as his zeal to discard an organization which the company (in his opinion) is determined to resist and which, in consequence, is of little benefit to the employees. The fact remains, however, that there has not been a reasonable opportunity to pursue collective bargaining, free from the distractions of these challenges to the union's bargaining agency. And, if we take Mr. Burke at his word, there will be no such opportunity because he or others of like mind will continue to file new termination applications.

37. In our opinion, the union should be entitled to a reasonable opportunity, free from challenge, to pursue negotiations for a new collective agreement. It has not had that opportunity to date, and it is unlikely to have one in the future unless the Board uses its powers under section 105(2)(i) to postpone, for a time, further applications to terminate the union's bargaining rights. To put the matter another way: the employees represented by the union should have the opportunity to have the union bargain on their behalf free from continuous challenges by those who continue to oppose the union, but who were unable to muster sufficient opposition in a representation vote to terminate the union's bargaining rights.

38. Without some limitation or bar under section 105(2)(i), repetitive termination applications will continue to undermine collective bargaining, and cause bargaining rights to wither, by attrition, as employees lose appetite and patience for a process which yields no tangible results - not because the union is making no efforts, but because the Board's processes are being invoked

repeatedly and without cost to impede the bargaining activity. In our opinion, section 105(2)(i) is designed to prevent that result, and is intentionally framed broadly, and in the alternative, so that the Board can deal with the particular mix of facts before it.

39. In the instant case, and for the same reasons as the earlier panel of the Board, this panel exercises its discretion under section 105(2)(i) to refuse to entertain Mr. Burke's application. The application is therefore dismissed. In addition, the Board hereby bars Mr. Burke from filing any new termination application for a period of six months from the date hereof. Having twice made application to the Board and twice had those applications rejected, we find Mr. Burke to be an "unsuccessful applicant" within the plain meaning of section 105(2)(i), from whom no further application should be received for a period of six months.

40. In our opinion, it is unnecessary, at this stage, to consider any further direction in respect of any of the employees in the bargaining unit affected by these three unsuccessful applications. Should any such further application be made within the next six months, it may be considered, at that time, in light of the circumstances then prevailing, as well as the three decisions of the Board disposing of the earlier termination applications.

COURT PROCEEDINGS

0429-91-U (Court File No. 692/92) Sobeys Inc., Applicant v. Food and Commercial Workers' International Union, Local 1000A, Respondent

Discharge - Intimidation and Coercion - Judicial Review - Unfair Labour Practice - Board finding employer in violation of the Act in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer's application for judicial review dismissed by Divisional Court

Board decision reported at [1992] OLRB Rep. Sept. 1020.

Ontario Court of Justice, Divisional Court, O'Brien, Hartt and Campbell JJ., July 27, 1993.

Campbell J. (Orally): It is not necessary to recite the facts of this case which are set out in the respective factums. The employer, concurrently with the announcement of Lease's termination and in the course of a nascent union organizing campaign, lectured employees about job loss among unionized competitors.

All of the circumstances, including the proportional severity of the discharge penalty in comparison with the background of the matter, including the lack of progressive discipline, the position of Lease at the centre of union activity at this critical time, are capable of supporting an inference of anti-union animus in the discharge of Lease.

The employer's earlier confrontation of Taylor about suspected union activity and the lack of any

real explanation for her effective demotion are capable of supporting an inference of anti-union animus. The timing of Taylor's resignation immediately after her demotion is capable of supporting an inference that there was a causal connection between the two events. As to the meetings, the combination of the "borderline", "subtle" material and the added context of the surrounding events, is capable of supporting the inference that the cumulative effect resulted in a breach of s.65 of the statute.

There was circumstantial evidence capable of supporting the various factual inferences drawn by the Board that anti-union animus was involved in the company's actions. This is particularly so in light of the reverse onus. Findings of the fact about anti-union animus lie at the core of the Tribunal's specialized expertise. The inferences drawn by the Board were clearly within its jurisdiction. The conclusions are neither patently unreasonable nor clearly irrational.

As to the issue of remedial jurisdiction, the Board's directions are well within its broad jurisdiction to order that the wrongful acts be rectified.

The application is therefore dismissed.

Costs to the respondent of \$3,500. the circumstances of this case do not justify a cost sanction. However, we do not countenance failure to comply with the Rules in respect of the filing of materials.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1231-89-R: Niagara Health Care and Service Workers Union Local 302 Affiliated with Christian Labour Association of Canada (Applicant) v. Fourth Tower Assets Inc. carrying on business as Cavendish Manor Retirement Home, Torgroup Management Inc., and Senior Care Services Inc. (Respondents)

Unit #1: "all employees of Torgroup Management Inc. working at Cavendish Manor Retirement Home in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation periods" (22 employees in unit)

Unit #2: "all employees of Torgroup Management Inc. regularly employed for not more than 24 hours per week and students employed during the school vacation periods working at Cavendish Manor Retirement Home in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (11 employees in unit)

Unit #3: "all employees of Senior Care Services Inc. working at Cavendish Manor Retirement Home in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation periods" (3 employees in unit)

Unit #4: "all employees of Senior Care Services Inc. regularly employed for not more than 24 hours per week and students employed during the school vacation periods working at Cavendish Manor Retirement Home in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (5 employees in unit)

0461-91-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hyundai Auto Canada Inc. AWP (Respondent)

Unit: "all employees of Hyundai Auto Canada Inc., at its aluminum wheel division in Newmarket, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and engineering staff" (69 employees in unit)

4138-91-R: Labourers International Union of North America Local 607 (Applicant) v. M. F. Jones Acoustics Division of 407185 Ontario Limited (Respondent)

Unit: "all construction labourers in the employ of M. F. Jones Acoustics Division of 407185 Ontario Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of M. F. Jones Acoustics Division of 407185 Ontario Limited in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0740-92-R: Labourers' International Union of North America - Local 607 (Applicant) v. Petawawa Construction Co. Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Petawawa Construction Co. Limited in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the District of Thunder

Bay, save and except non-working foremen and persons above the rank of non-working foreman, office and clerical staff" (13 employees in unit)

1084-92-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. H. Brown Electrical Services Limited (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Brown Electrical Services Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Brown Electrical Services Limited in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1997-92-R: IWA-Canada, Local 2693 (Applicant) v. 549126 Ontario Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 549126 Ontario Limited, operating as Woodlands Inn, in the Town of Longlac, save and except working supervisors, persons above the rank of working supervisor, those persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in a co-operative training program from a recognized educational institution" (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2574-92-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Mark Van Roon and David Clement carrying on business as Northern Energy Co. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Mark Van Roon and David Clement carrying on business as Northern Energy Co., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Mark Van Roon and David Clement carrying on business as Northern Energy Co. in all sectors of the construction industry in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3631-92-R: International Union of Bricklayers and Allied Craftsmen Local 4 Ontario (Applicant) v. C Cor Ltd. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of C Cor Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of C Cor Ltd. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3770-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all security guards employed by Burns International Security Services Limited, in the Town of Hawkesbury, save and except supervisors, and persons above the rank of supervisor" (4 employees in unit)

0077-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1019139 Ontario Limited (Respondent)

Unit: "all construction labourers in the employ of 1019139 Ontario Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institu-

tional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0137-93-R: Labourers’ International Union of North America, Local 1089 (Applicant) v. 405730 Ontario Limited carrying on business as The New Hiawatha Horse Park and Entertainment Centre (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of 405730 Ontario Limited carrying on business as The New Hiawatha Horse Park and Entertainment Centre employed as mutual sellers in the City of Sarnia, save and except supervisors and persons above the rank of supervisor” (23 employees in unit) (*Having regard to the agreement of the parties*)

0179-93-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Northumberland (Respondent)

Unit: “all employees of The Corporation of the County of Northumberland employed in its Social Services Department, save and except Supervisors, Director of Social Services, persons above the rank of Director of Social Services, CITE Co-ordinator, Office Manager, Secretary to the Director of Social Services and persons for whom any trade union held bargaining rights as of April 16, 1993” (39 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0225-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Gus Mechanical (Respondent)

Unit: “all journeymen and apprentice plumbers and pipefitters in the employ of Gus Mechanical in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice plumbers and pipefitters in the employ of Gus Mechanical in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0295-93-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. J. Dancey Limited c.o.b. Dancey Electric (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of J. Dancey Limited c.o.b. Dancey Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of J. Dancey Limited c.o.b. Dancey Electric in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0333-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Reclamation Management Canada Ltd. (Respondent)

Unit: “all employees of Reclamation Management Canada Ltd., in the City of Elliot Lake, save and except project foremen, persons above the rank of project foreman, office, clerical and technical staff” (5 employees in unit)

0334-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cal-Nevada Iron and Metals Corp. (Respondent)

Unit: “all employees of Cal-Nevada Iron and Metals Corp., in the City of Elliot Lake, save and except project foremen, persons above the rank of project foreman, office, clerical and technical staff” (21 employees in unit)

0358-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Intel-Communication Inc. c.o.b. Can-Beta (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Intel-Communication Inc. c.o.b. Can-Beta in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Intel-Communication Inc. c.o.b. Can-Beta in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0404-93-R: Canadian Union of Public Employees (Applicant) v. AIDS Committee of Toronto (Respondent)

Unit: “all employees of the AIDS Committee of Toronto in the Municipality of Metropolitan Toronto, save and except Directors, persons above the rank of Director, Manager of Finance and Office Manager” (29 employees in unit) (*Having regard to the agreement of the parties*)

0418-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Allwaste of Canada Ltd. and 770950 Ontario Limited (Respondent)

Unit: “all employees of Allwaste of Canada Ltd. and 770950 Ontario Limited c.o.b. as Caligo at the Chrysler Plant, 2000 Williams Parkway in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff” (48 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0432-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. The Cadillac Fairview Corporation Limited (Respondent)

Unit: “all cleaning staff of The Cadillac Fairview Corporation Limited at Masonville Place, 1680 Richmond Street in the City of London, save and except forepersons, persons above the rank of foreperson, office and clerical staff, retail, technical and sales staff, security guards, maintenance staff and staff employed at Links Indoor Miniature Golf” (8 employees in unit) (*Having regard to the agreement of the parties*)

0466-93-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Katalin Lanczi Pharmacy Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart at 275 Eramosa Road in the City of Guelph, save and except Assistant Manager, persons above the rank of Assistant Manager, Merchandising Manager, Pricing Systems Manager, Head Cashier, Pharmacists, office and clerical staff” (27 employees in unit) (*Having regard to the agreement of the parties*)

0487-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all security guards in the employ of Apex Investigation & Security Inc. at Revenue Canada, 201 May Street in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

0488-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all security guards in the employ of Apex Investigation & Security Inc. at McKellar Hospital, 325 Archibald St. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

0489-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all security guards in the employ of Apex Investigation & Security Inc. at the Keskus Mall in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

0490-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all security guards in the employ of Apex Investigation & Security Inc. at Maplecreek Towers, 590 Beverly St. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff” (3 employees in unit) *(Having regard to the agreement of the parties)*

0491-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all security guards in the employ of Apex Investigation & Security Inc. at Motorways, 470 Balmoral Ave. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff” (3 employees in unit) *(Having regard to the agreement of the parties)*

0508-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all security guards in the employ of Apex Investigation & Security Inc. at the Victoriaville Mall in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff” (1 employee in unit) *(Having regard to the agreement of the parties)*

0509-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards employed by Group 4 C.P.S. Limited at 155 First Avenue in the City of Oshawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (4 employees in unit) *(Having regard to the agreement of the parties)*

0513-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 281 (Respondent)

Unit: “all employees of York Condominium Corporation No. 281 engaged in cleaning and maintenance at 625 and 627 The West Mall in the Municipality of Metropolitan Toronto, including resident Superintendents, save and except Property Manager, persons above the rank of Property Manager, office and clerical staff” (6 employees in unit) *(Having regard to the agreement of the parties)*

0521-93-R: International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Levko Electrical Contracting Company (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Levko Electrical Contracting Company in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Levko Electrical Contracting Company in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

0525-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards employed by Group 4 C.P.S. Limited at 450 Highbury Avenue in the City of London, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (2 employees in unit) *(Having regard to the agreement of the parties)*

0527-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards employed by Group 4 C.P.S. Limited at 700 Gordon Street in the City of Whitby, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (3 employees in unit) *(Having regard to the agreement of the parties)*

0529-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all security guards in the employ of Apex Investigation & Security Inc. at Provincial Paper, Shipyard Road in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff” (3 employees in unit) *(Having regard to the agreement of the parties)*

0536-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Gascon Associated Erectors Ltd. (Respondent)

Unit: “all iron workers and iron workers’ apprentices in the employ of Gascon Associated Erectors Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all iron workers and iron workers’ apprentices in the employ of Gascon Associated Erectors Ltd., in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0537-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Oakdale Cleaners & Maintenance Ltd. (Respondent)

Unit: “all employees of Oakdale Cleaners & Maintenance Ltd. in the City of London, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and sales staff” (5 employees in unit) *(Having regard to the agreement of the parties)*

0569-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all employees of Meadowvale Security Guard Services Inc. employed at 165 University Avenue in the Municipality of Metropolitan Toronto, save and except patrol supervisor and persons above the rank of patrol supervisor” (3 employees in unit) *(Having regard to the agreement of the parties)*

0573-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards employed by Group 4 C.P.S. Limited at the Oshawa Foods work site, 6355 Viscount Road in the City of Mississauga, save and except supervisors and persons above the rank of supervisor” (10 employees in unit) *(Having regard to the agreement of the parties)*

0574-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards employed by Group 4 C.P.S. Limited at the Ford Motor Company work site, 7455 Birchmount Road in the City of Markham, save and except supervisors and persons above the rank of supervisor” (10 employees in unit) *(Having regard to the agreement of the parties)*

0586-93-R: Canadian Union of Public Employees (Applicant) v. Rideau Place Retirement Center (Respondent)

Unit: “all employees of Rideau Place Retirement Center in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, confidential secretary/bookkeeper, registered and graduate nurses” (57 employees in unit) *(Having regard to the agreement of the parties)*

0597-93-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. 1015037 Ontario Inc. (Respondent) v. Ironworkers’ District Council of Ontario and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Intervener)

Unit: “all employees of 1015037 Ontario Inc. in the City of Chatham, save and except supervisors, persons above the rank of supervisor, office and sales staff, ironworkers, ironworkers’ apprentices and millwrights” (6 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

0599-93-R: The Amalgamated Transit Union, Local 1572 (Applicant) v. McIntosh Limousine Service Ltd., Air Cab Limousine Services (1985) Limited and Aaroprt Limousine Services Ltd. (Respondent)

Unit: “all dependent contractors of McIntosh Limousine Service Ltd., Air Cab Limousine Services (1985) Limited and Aaroprt Limousine Services Ltd. in its limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except supervisors, persons above the rank of supervisor, dispatchers and office and sales staff” (186 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0600-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: “all employees of Ontario Guard Services Inc. employed at #10 and #20 Avoca Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (9 employees in unit) (*Having regard to the agreement of the parties*)

0601-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all employees of Meadowvale Security Guard Services Inc. employed at 141 Adelaide Street and 155 University Avenue in the Municipality of Metropolitan Toronto, save and except patrol supervisors and persons above the rank of patrol supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

0608-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Nelsons Laundries Limited (Respondent)

Unit: “all employees of Nelsons Laundries Limited in the Regional Municipality of Hamilton/Wentworth, save and except supervisors, persons above the rank of supervisor, office staff, clerical staff, sales staff, route persons (drivers) and students employed during the school vacation period” (24 employees in unit) (*Having regard to the agreement of the parties*)

0609-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Centra Gas Ontario Inc. (Respondent)

Unit: “all office and clerical employees of Centra Gas Ontario Inc. in the City of Kingston, save and except Supervisors, persons above the rank of Supervisor, sales staff, Area Services Coordinator, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of May 21, 1993” (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0612-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Sears Canada site, 100 Valleybrook Drive, in the Municipality of Metropolitan Toronto (North York), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

0614-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Allstate Insurance site, 10 Allstate Parkway, in the Town of Markham, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (5 employees in unit)

0615-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Palisades work site, 195 Wynford Drive, in the Municipality of Metropolitan Toronto (North York), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

0616-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the H & R Developments site, 55 Yonge Street, in the Municipality of Metropolitan Toronto, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (2 employees in unit)

0617-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Residences of Ridley, 271 Ridley Boulevard, in the Municipality of Metropolitan Toronto (North York), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0618-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the YWCA site, 15 Pape Avenue, in the Municipality of Metropolitan Toronto, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

0619-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Savoy work site, 10 Torresdale Avenue, in the Municipality of Metropolitan Toronto (North York), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0620-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Toronto Public Library work sites, 327 Bathurst Street, 1303 Queen Street West, 100 Queen Street East and 269 Gerrard Street East, in the Municipality of Metropolitan Toronto, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

0621-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited in the Borough of East York, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

0622-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the HND Develop-

ments site, 180 Dundas Street West, in the Municipality of Metropolitan Toronto, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

0623-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the York Condominium work site, 1900 Sheppard Avenue East, in the Municipality of Metropolitan Toronto (North York), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

0624-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited in the Town of Stouffville, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0625-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited in the Town of Richmond Hill, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

0626-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Alexis Nihon Corporation site, 365 Bay Street, in the Municipality of Metropolitan Toronto, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0632-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all employees of Group 4 C.P.S. Limited c.o.b. as Canadian Protection Services in the City of Brampton, save and except site supervisors and those above the rank of site supervisor” (82 employees in unit) (*Having regard to the agreement of the parties*)

0636-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Millgate Manor site, 303 Mill Road, in the Municipality of Metropolitan Toronto (Etobicoke), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

0637-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited in the City of Mississauga, save and except Site Supervisors/Guard Inspectors, persons above the rank of Site Supervisor/Guard Inspector, office, clerical and sales staff, students employed during the school vacation period and Security

Guards employed by Burns International Security Services Limited at the Parke Davis, Indal Technologies and Inglis sites” (90 employees in unit) (*Having regard to the agreement of the parties*)

0638-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Black Creek Pioneer Village site, 1000 Murray Ross Parkway in the Municipality of Metropolitan Toronto (North York), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

0639-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Customized Transport site, 265 Rutherford Road South in the City of Brampton, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

0640-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Merisel Canada site, 75 Medulla Avenue in the Municipality of Metropolitan Toronto, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

0642-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the PPG Canada site, 3730 Lakeshore Boulevard, in the Municipality of Metropolitan Toronto (Etobicoke), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

0643-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Corundol Environmental site, 55 Vulcan Street, in the Municipality of Metropolitan Toronto (Etobicoke), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

0645-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Smith Kline Beecham site, 2 Norelco Drive, in the Municipality of Metropolitan Toronto (York), save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

0646-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited at the Beatrice Foods site, 16 Shaftsbury Lane, in the City of Brampton, save and except Guard Inspectors, persons above the rank

of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

0647-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all Security Guards employed by Burns International Security Services Limited in the City of Scarborough, save and except Site Supervisors/Guard Inspectors, persons above the rank of Site Supervisor/Guard Inspector, office, clerical and sales staff, students employed during the school vacation period and Security Guards employed by Burns International Security Services Limited at the Canada Post, Estee Lauder, Doulton, Monterey, Robin Hood, Sterling Club and Lawson Paperwork sites" (75 employees in unit) (*Having regard to the agreement of the parties*)

0655-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: "all security guards in the employ of Apex Investigation & Security Inc. at Shoppers Drug Mart, 1186 Memorial Avenue in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, mobile patrol officers, security system installers, investigators, office, sales and clerical staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

0660-93-R: International Union, United Plant Guard Workers of America (Applicant) v. Harold Security Service Limited (Respondent)

Unit: "all employees of Harold Security Service Limited in the Province of Ontario, save and except sergeants, persons above the rank of sergeant, and office and clerical staff" (48 employees in unit) (*Having regard to the agreement of the parties*)

0668-93-R: Retail, Wholesale and Department Store Union (Applicant) v. Sudbury Laundry and Dry Cleaners Ltd. (Respondent)

Unit: "all employees of Sudbury Laundry and Dry Cleaners Ltd. in the Regional Municipality of Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (32 employees in unit) (*Having regard to the agreement of the parties*)

0680-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all Security Guards employed by Burns International Security Services Limited in the Town of Ajax, save and except Site Supervisors, persons above the rank of Site Supervisor, office, clerical and sales staff, and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

0691-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Matthews The Lumber People Inc. (Respondent)

Unit: "all employees of Matthews The Lumber People Inc. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, security guards and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

0692-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. at 3050 Ellesmere Road in the City of Scarborough, save and except patrol supervisors and persons above the rank of patrol supervisor" (6 employees in unit) (*Having regard to the agreement of the parties*)

0698-93-R: International Brotherhood of Painters and Allied Trades - Local Union 1891 (Applicant) v. Action Drywall (Respondent)

Unit: "all painters and painters apprentices in the employ of Action Drywall in the industrial, commercial and

institutional sector of the construction industry in the Province of Ontario, and all painters and painters apprentices in the employ of Action Drywall in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0700-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Ontario Pro Welding Inc. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of Ontario Pro Welding Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of Ontario Pro Welding Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0712-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Mario De Giovanni Housing Co-operative Inc. (Respondent)

Unit: “all employees of Mario De Giovanni Housing Co-operative Inc. in the City of Ottawa, save and except Directors and persons above the rank of Director” (2 employees in unit) (*Having regard to the agreement of the parties*)

0738-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all Security Guards in the employ of Apex Investigation & Security Inc. at Abitibi Thunder Bay in the City of Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Mobile Patrol Officers, Security System Installers, Investigators, office, sales and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

0739-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all Security Guards in the employ of Apex Investigation & Security Inc. at Abitibi Mission in the City of Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Mobile Patrol Officers, Security System Installers, Investigators, office, sales and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

0740-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all Security Guards in the employ of Apex Investigation & Security Inc. at 410 Mountdale Avenue in the City of Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Mobile Patrol Officers, Security System Installers, Investigators, office, sales and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

0754-93-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses, Simcoe County Branch (Respondent)

Unit: “all registered and graduate nursing assistants employed in a nursing capacity by the Victorian Order of Nurses, Simcoe County Branch in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (22 employees in unit) (*Having regard to the agreement of the parties*)

0757-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited in the Town of Oak-

ville, save and except Site Supervisors, persons above the rank of Site Supervisor, office, clerical and sales staff, and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the parties*)

0758-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all Security Guards employed by Burns International Security Services Limited at the Promenade site of Burns International Security Services Limited, 7420 Bathurst Street, in the City of Vaughan, save and except Guard Inspectors, persons above the rank of Guard Inspector, office, clerical and sales staff and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

0798-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Rodo Industries Inc. and The Table and Chair Co. Inc. (Respondents)

Unit #1: "all employees of Rodo Industries Inc. in the City of London, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of The Table and Chair Co. Inc., in the City of London, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (1 employees in unit) (*Having regard to the agreement of the parties*)

0801-93-R: Ontario Public Service Employees Union (Applicant) v. Trinity Square Cafe Inc. (Respondent)

Unit: "all employees of Trinity Square Cafe Inc. in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (8 employees in unit) (*Having regard to the agreement of the parties*)

0803-93-R: Teamsters Local Union No. 419 (Applicant) v. 474121 Ontario Inc. O/A Academy Driver Training O/A Young Drivers of Canada (Respondent)

Unit: "all employees of 474121 Ontario Inc. O/A Academy Driver Training O/A Young Drivers of Canada in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

0842-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. London Floor Services Limited (Respondent)

Unit: "all employees of London Floor Services Limited employed at 451 Talbot Street, in the City of London, save and except non-working supervisors, persons above the rank of non-working supervisor, office and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

0855-93-R: IWA - Canada (Applicant) v. Jean Paul Lecours Ltd. T/A Lecours Motor Sales (Respondent)

Unit: "all employees of Jean Paul Lecours Ltd. T/A Lecours Motor Sales in the Town of Hearst, save and except managers, persons above the rank of manager and office employees" (7 employees in unit) (*Having regard to the agreement of the parties*)

0860-93-R: Canadian Union of Public Employees (Applicant) v. Forest Products Accident Prevention Association (Respondent)

Unit: "all employees of the Forest Products Accident Prevention Association in the Province of Ontario, save and except Managers and persons above the rank of Manager, Controller and Confidential Secretary" (17 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0767-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Associated Toronto Taxi-Cab Limited (Respondent)

Unit: "all employees of Associated Toronto Taxi-Cab Limited operating under the roof sign Co-Op in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees" (1866 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	310
Number of ballots marked in favour of applicant	195
Number of ballots marked against applicant	98
Number of ballots segregated and not counted	17

3735-92-R: Association of Allied Health Professionals: Ontario (Applicant) v. Baycrest Centre for Geriatric Care (Respondent) v. Baycrest Social Service Staff Association (Intervener)

Unit: "all social workers, social service workers, program workers and recreationalists who have completed their probationary period and who are permanently employed on a full time or part time basis by Baycrest Centre for Geriatric Care in Metropolitan Toronto, save and except Department Head and persons above the rank of Department Head and those persons covered by subsisting collective agreements" (72 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	75
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	35
Number of ballots marked in favour of intervener	7
Number of ballots segregated and not counted	2

0352-93-R: Ontario Public Service Employees Union (Applicant) v. Family Focus/Leeds & Grenville (Respondent)

Unit: "all employees of Family Focus/Leeds & Grenville in the United Counties of Leeds & Grenville, save and except managers, persons above the rank of manager, administrative assistant to the executive director, accountant" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	19
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	19
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	5

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3481-92-R: Ontario Public Service Employees Union (Applicant) v. The Riverside Hospital of Ottawa (Respondent) v. The Association of Allied Health Professionals: Ontario (Intervener)

Unit: "all paramedical employees of The Riverside Hospital of Ottawa in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, and employees in the bargaining units for which any trade union held bargaining rights as of May 19, 1987" (77 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	56
Number of ballots marked in favour of applicant	

30

Number of ballots marked in favour of intervener

26

0250-93-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America UAW (Applicant) v. ITT Industries of Canada Ltd. c.o.b. as ITT Hancock Canada (Respondent)

Unit: "all employees of ITT Industries of Canada Ltd. in its ITT Hancock Canada Division in the City of St. Thomas, in the County of Elgin, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, quality control staff, technical staff and students employed during the school vacation period" (117 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	115
Number of persons who cast ballots	109
Number of ballots marked in favour of applicant	56
Number of ballots marked against applicant	53

0356-93-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. R. Lessard Trucking Ltd. (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 (Intervener)

Unit: "all its employees of R. Lessard Trucking Ltd. employed as drivers, including owner-drivers, on the employer company payroll, excluding office personnel, within the Counties of Essex and Kent" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7

0412-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. 683638 Ontario Ltd. (Respondent)

Unit: "all employees of 683638 Ontario Ltd. at the Aurora Retirement Centre in the Town of Aurora, save and except Managers and persons above the rank of Manager" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	1

Applications for Certification Dismissed Without Vote

0212-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Acme Building & Construction Ltd. (Respondent) (2 employees in unit)

4144-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Metroland Printing, Publishing and Distributing Limited c.o.b. as Ajax/Pickering News Advertiser (Respondent)

Unit: "all dependent contractors of Ajax/Pickering News Advertiser, a division of Metroland Printing, Publishing and Distributing Limited in the City of Ajax, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (*Clarity Note*)

4174-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Metroland Print-

ing, Publishing and Distributing Limited c.o.b. as Oshawa/Whitby This Week (Respondent) (12 employees in unit)

3172-92-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. 976604 Ontario Inc. o/a Napier Insulation (Respondent) (3 employees in unit)

3734-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. MJR Contractors Ltd. (Respondent) (3 employees in unit)

3745-92-R: Retail, Wholesale and Department Store Union (Applicant) v. J & D Flanagan Sales & Distribution Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of J & D Flanagan Sales & Distribution Ltd. in and out of the Regional Municipality of Sudbury, save and except foremen, persons above the rank of foreman, sales, office and clerical staff and persons regularly employed for not more than 24 hours per week" (16 employees in unit)

0337-93-R: Ontario Secondary School Teachers' Federation (Applicant) v. Carleton Board of Education (Respondent) (35 employees in unit)

0613-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent) (2 employees in unit)

0641-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent) (3 employees in unit)

0644-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent) (3 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0764-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Kingsboro Taxi Limited (Respondent)

Unit #1: "all employees of the respondent operating under the roof sign "Kingsboro" in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees" (258 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	96
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	66

0765-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Beck Taxi Limited (Respondent)

Unit #1: "all employees of the respondent operating under the roof sign "Beck" in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees" (858 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	235
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	78
Number of ballots marked against applicant	156
Number of ballots segregated and not counted	0

0766-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Scarborough City Cab Company Limited (Respondent)

Unit #1: "all employees of the respondent operating under the roof sign "Scarborough City" in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees" (163 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	24
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	20

0768-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Canadian Taxi Corporation (Respondent)

Unit #1: "all employees of the respondent operating under the roof sign "Kipling Kab" in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees." (86 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	31
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	0

0769-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. 442714 Ontario Limited, A-Kwik Taxi Limited, Royal Taxi Limited, 935772 Ontario Limited c.o.b. as "Royal Taxi" and/or "A-Kwik Royal Taxi" (Respondents)

Unit #1: "all employees of the respondent operating under the roof signs "Royal" of "A-Kwik Royal" in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/leasees." (198 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	198
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	68
Number of ballots marked against applicant	128
Number of ballots segregated and not counted	1

1271-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Able-Atlantic Taxi (1989) Ltd. (Respondent)

Unit #1: "all employees of the respondent operating under the roof sign "Able Atlantic" in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, dispatchers, call takers, maintenance staff, office and clerical staff and multi-plate/multi-cab owners/leasees." (424 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	206
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	171
Number of ballots segregated and not counted	2

0162-92-R: Christian Labour Association of Canada (Applicant) v. Torwest Electric (Respondent) v. International Brotherhood of Electrical Workers', Local 804, International Brotherhood of Electrical Workers, Local 353 (Intervenors)

Unit #1: "all journeymen electricians and registered apprentices in the employ of the respondent in the indus-

trial, commercial and institutional sector of the construction industry and in all sectors of the construction industry in OLRB Area 8 save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit) (*Having regard to the agreement of the parties*)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1990-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Miracle Construction Limited (Respondent) v. Labourers’ International Union of North America, Local 1059 (Intervener)

Unit: “all employees of Miracle Construction Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of Miracle Construction Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	5
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	4

2035-92-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Miracle Construction Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of Miracle Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Miracle Construction Limited in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except foremen and persons above the rank of non-working foreman” (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	6
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	6

Applications for Certification Withdrawn

3553-92-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Hurley Corporation (Respondent) v. Labourers’ International Union of North America, Local 183 (Intervener)

3570-92-R: Independent Canadian Transit Union (Applicant) v. Sisters of Charity at Ottawa c.o.b. Saint Vincent Hospital (Respondent) v. The Association of Allied Health Professionals: Ontario (Intervener)

3580-92-R: International Union of Bricklayer and Allied Craftsmen Local 4, Ontario (Applicant) v. Ashley Masonry Inc. (Respondent)

0339-93-R: United Steelworkers of America (Applicant) v. D. & A. MacLeod Company Ltd., in its capacity as Trustee in Bankruptcy of Universal Investigation Service Inc., a bankrupt, and not in its personal capacity; Pinkerton’s of Canada Limited and Universal Investigation Service Inc., (Respondents)

0409-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

0417-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. Tile Chem Limited (Respondent)

0493-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

0503-93-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Concord Interiors (Respondent)

0506-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

0526-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

0531-93-R: Canadian Union of Public Employees (Applicant) v. Scadding Court Community Centre Inc. (Respondent)

0534-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Touram Inc. (Respondent)

0538-93-R: Seafarers' International Union of Canada (Applicant) v. Apex Security & Investigations (Respondent) v. Canadian Security Union (Intervener)

0557-93-R: Seafarers' International Union of Canada Revenue Canada Building (Applicant) v. Apex Security & Investigations (Respondent) v. Canadian Security Union (Intervener)

0558-93-R: Seafarers' International Union of Canada (Applicant) v. Apex Security & Investigations (Respondent) v. Canadian Security Union (Intervener)

0559-93-R: Seafarers' International Union of Canada (Applicant) v. Apex Security & Investigations (Respondent) v. Canadian Security Union (Intervener)

0560-93-R: Seafarers International Union of Canada (Applicant) v. Apex Security & Investigations (Respondent)

0561-93-R: Seafarers' International Union of Canada (Applicant) v. Apex Security & Investigations (Respondent)

0562-93-R: Seafarers' International Union of Canada (Applicant) v. Apex Security & Investigations (Respondent)

0571-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

0572-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

0592-93-R: Labourers' International Union of North America, Local 607 (Applicant) v. Cortland Contracting & Building Systems Ltd. (Respondent)

0634-93-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Sifton Properties Limited (Respondent)

0654-93-R: Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

0728-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Sifton Properties Limited (Respondent)

0847-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Quno Corp. (Respondent)

0856-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

0959-93-R: The Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. The Benjamin Koyman Group Inc. c.o.b. as Artworks/Koyman (Respondent)

1019-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

1051-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. PC World (Respondent)

1069-93-R: United Steelworkers of America (Applicant) v. Canadian Protection Services Limited (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3097-92-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Mississauga Hydro-Electric Commission (Respondent) (*Granted*)

3482-92-R: Ontario Public Service Employees Union (Applicant) v. The Riverside Hospital of Ottawa (Respondent) (*Granted*)

3562-92-R: International Association of Machinists and Aerospace Workers (Applicant) v. Premark Canada Inc. (Respondent) (*Granted*)

0111-93-R; 0112-3-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Culinar Inc. (Respondent) (*Granted*)

0324-93-R: Neelon Casting Ltd. (Applicant) v. United Steelworkers of America (Respondent) (*Granted*)

0515-93-R: The Carleton Board of Education (Applicant) v. The Ontario Secondary School Teachers' Federation (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3008-91-R: International Brotherhood of Electrical Workers', Local 353 (Applicant) v. Bren Electrical Contractors Limited and Torwest Electric Limited (Respondents) (*Withdrawn*)

1458-92-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Hepburn Electrical and Contracting Ltd., 805727 Ontario Limited c.o.b. as Brite Ideas (Respondents) (*Endorsed Settlement*)

1658-92-R: International Brotherhood of Painters and Allied Trades, Local 1795 - Glaziers (Applicant) v. AFG Glass Inc., 357141 Ontario Inc., Main Construction (Respondents) (*Withdrawn*)

1675-92-R: United Steelworkers of America (Applicant) v. I.M. International Inc., Liquid Carbonic Inc., X.L. Personnel Quebec Inc., Mary McFall and Anne Marie Ostiguy (Respondents) (*Withdrawn*)

1805-92-R: International Association of Heat and Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Premier Insulations Ltd. and AC&I Services Ltd. (Respondents) v. International Brotherhood of Painters and Allied Trades, Local 1891 (Intervener) (*Withdrawn*)

2457-92-R: United Brotherhood of Carpenters and Joiners of America Local 2041, United Brotherhood of

Carpenters and Joiners of America Local 1316 (Applicants) v. J.A. MacDonald (London) Limited and Ontario Panelization Ltd. (Respondents) (*Withdrawn*)

2639-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Farry Excavating & Grading Limited, 422614 Ontario Limited, Farmark Contracting Inc., Ferruccio Longo, Mary Longo, Farmark Haulage Inc. (Respondents) (*Granted*)

2715-92-R: Labourers' International Union of North America, Local 837 (Applicant) v. Kopic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kopic Wrecking (Respondents) (*Granted*)

2772-92-R: Labourers' International Union of North America, Local 506 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents) (*Granted*)

3025-92-R: Ontario Pipe Trades Council (Applicant) v. Dynamic Power Excavating Ltd., Dynamic Plumbing & Fire Protection Co. Ltd., I.P.J. Investments Ltd. (Respondents) (*Granted*)

3744-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sunrise Electric Ltd. and Sunlight Electric Limited (Respondents) (*Granted*)

3801-92-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 506 (Applicant) v. Thor Construction Inc. and Vic Priestly Contracting Limited (Respondents) (*Withdrawn*)

0136-93-R: Iron Workers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. G.B. Metals Limited, Aprich Enterprises Ltd., Arnold Glen Bursey (Respondents) (*Granted*)

0143-93-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Urtech Electric Inc., 640130 Ontario Limited, 694270 Ontario Limited (Respondents) (*Withdrawn*)

0394-93-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Premier Group Masonry Co. Ltd., 627045 Ontario Limited (o/a Lane Masonry) and Lane Masonry Contractors Ltd. and Regent Group Masonry Inc. (Respondents) (*Granted*)

0566-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers; International Union of North America, Local 506 and Labourers' International Union of North America, Local 1081 (Applicant) v. J.P.C. Wrecking Ltd. and J.P.C. Wrecking (1988) Inc. and Philip Demolition Inc., Philip Demolition Ltd., Philip Environmental Inc. (Respondents) (*Withdrawn*)

0683-93-R: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Elton General Contracting Ltd., Concord Interiors Ltd., Melcev Enterprises Inc. (Respondents) (*Granted*)

0797-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Rodo Industries Inc. and The Table and Chair Co. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3008-91-R: International Brotherhood of Electrical Workers', Local 353 (Applicant) v. Bren Electrical Contractors Limited and Torwest Electric Limited (Respondents) (*Withdrawn*)

1458-92-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Hepburn Electrical and Contracting Ltd., 805727 Ontario Limited c.o.b. as Brite Ideas (Respondents) (*Granted*)

1658-92-R: International Brotherhood of Painters and Allied Trades, Local 1795 - Glaziers (Applicant) v. AFG Glass Inc., 357141 Ontario Inc., Main Construction (Respondents) (*Withdrawn*)

1674-92-R: United Steelworkers of America (Applicant) v. I.M. International Inc., Liquid Carbonic Inc. and/or X.L. Personnel Quebec Inc. and/or Mary McFall and/or Anne Marie Ostiguy (Respondents) (*Withdrawn*)

2456-92-R: United Brotherhood of Carpenters and Joiners of America Local 2041, United Brotherhood of Carpenters and Joiners of America Local 1316 (Applicants) v. J.A. MacDonald (London) Limited and Ontario Panelization Ltd. (Respondents) (*Withdrawn*)

2639-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Farry Excavating & Grading Limited, 422614 Ontario Limited, Farmark Contracting Inc., Ferruccio Longo, Mary Longo, Farmark Haulage Inc. (Respondents) (*Granted*)

2715-92-R: Labourers' International Union of North America, Local 837 (Applicant) v. Kopic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kopic Wrecking (Respondents) (*Granted*)

2772-92-R: Labourers' International Union of North America, Local 506 (Applicant) v. Murray Sklar Investments Inc. and Jordan Construction Management Inc. (Respondents) (*Granted*)

3025-92-R: Ontario Pipe Trades Council (Applicant) v. Dynamic Power Excavating Ltd., Dynamic Plumbing & Fire Protection Co. Ltd., I.P.J. Investments Ltd. (Respondents) (*Granted*)

3744-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sunrise Electric Ltd. and Sunlight Electric Limited (Respondents) (*Granted*)

3801-92-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 506 (Applicant) v. Thor Construction Inc. and Vic Priestly Contracting Limited (Respondents) (*Withdrawn*)

0084-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Concorde Maintenance Corp. and K & Son Maintenance Co. Inc. (Respondents) (*Granted*)

0136-93-R: Iron Workers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. G.B. Metals Limited, Aprich Enterprises Ltd., Arnold Glen Bursey (Respondents) (*Granted*)

0143-93-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Urtech Electric Inc., 640130 Ontario Limited, 694270 Ontario Limited (Respondents) (*Withdrawn*)

0394-93-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Premier Group Masonry Co. Ltd., 627045 Ontario Limited (o/a Lane Masonry) and Lane Masonry Contractors Ltd. and Regent Group Masonry Inc. (Respondents) (*Granted*)

0548-93-R: United Steelworkers of America (Applicant) v. Universal Investigation Service Inc. and Pinkerton's of Canada Limited (Respondents) (*Withdrawn*)

0566-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers; International Union of North America, Local 506 and Labourers' International Union of North America, Local 1081 (Applicant) v. J.P.C. Wrecking Ltd. and J.P.C. Wrecking (1988) Inc. and Philip Demolition Inc., Philip Demolition Ltd., Philip Environmental Inc. (Respondents) (*Withdrawn*)

0683-93-R: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Elton General Contracting Ltd., Concord Interiors Ltd., Melcev Enterprises Inc. (Respondents) (*Granted*)

0871-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pacific Building Maintenance Ltd., Crystal Building Services Ltd. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0872-93-R: United Steelworkers of America (Applicant) v. Citicom Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3167-91-R: Rosetta Luciani (Applicant) v. The Hotel Employees: Restaurant Employees Union, Local 75 of the Hotel Employees, Restaurant Employees International Union (Respondent) v. Cara Operations Limited (Intervener)

Unit: “all employees of Cara Operations Limited in its Airline Services Division at its Flight Kitchens at the Toronto International Airport, save and except supervisors, persons above the rank of supervisor and office staff” (760 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	754
Number of persons who cast ballots	524
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	524
Number of spoiled ballots	3
Number of ballots marked in favour of respondent	48
Number of ballots marked against respondent	473

0346-92-R: Neal Weise (Applicant) v. The International Brotherhood of Electrical Workers, The IBEW Construction Council of Ontario (Respondent) (*Dismissed*)

1887-92-R: David Vent (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) v. Reliable Bookbinders Limited (Intervener) (*Dismissed*)

2770-92-R: Vincent Spirito & Sons Ltd. (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 93 (Respondent) (*Dismissed*)

3457-92-R: Frank Kelleway (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) v. Pro-Art Graphics Limited (Intervener)

Unit: “all employees of Pro-Art Graphics Limited in the Regional Municipality of York save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff and persons regularly employed for not more than twenty-four hours per week” (17 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	11

3623-92-R: John Lalumiere (Applicant) v. International Union of United Plant Guard Workers of America, Local 1962 (Respondent) v. Ontario Food Terminal Board (Intervener)

Unit: “all security guards employed by Ontario Food Terminal Board at 165 The Queensway, Metropolitan Toronto, save and except sergeants and persons above the rank of sergeant, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation periods” (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of spoiled ballots	0

Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	10

0182-93-R: Randy A. Burke (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Venture Industries Canada, Ltd. (Intervener)

Unit: "all regular plant employees of Venture Industries Canada, Ltd. at its plant in Wallaceburg, Ontario, save and except foremen, persons above the rank of foreman, office staff, sales staff and students employed during the summer vacation period" (13 employees in unit) (*Dismissed*)

0407-93-R: Employees of MacMillan Bloedel Building Materials Limited (Applicant) v. Sudbury Mine Mill and Smelter Workers Union, Local 598, of the Canadian Union of Mine Mill and Smelter Workers (Respondent) v. MacMillan Bloedel Building Materials Limited (Intervener) (*Granted*)

0419-93-R: Jeff MacLeod (Applicant) v. Labourers' International Union of North America Local 1059 (Respondent) v. Strathroy Concrete Forming (1988) Inc. (Intervener) (*Withdrawn*)

0449-93-R: Kirsten A. Taylor (Employee of Georgian Motor Hotel) (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Dismissed*)

0542-93-R; 0543-93-R; 0594-93-R: Greg Hamid (Applicant) v. United Food and Commercial Workers International Union, Local 175/633 (Respondent) v. Penny Lane Food Markets Ltd. (Intervener); Peter Devellis (Applicant) v. United Food and Commercial Workers International Union, Local 175/633 (Respondent) v. Penny Lane Food Markets Ltd. (Intervener); Simon Rowe (Applicant) v. United Food and Commercial Workers International Union, Local 175/633 (Respondent) v. Penny Lane Food Markets Ltd. (Intervener) (*Withdrawn*)

0670-93-R: Guardsman Products Ltd. (Applicant) v. Industrial and Commercial Workers' Union (Respondent) (*Withdrawn*)

0701-93-R: Lisa Moon, Michelle Shannon (Applicants) v. OPEIU Local 343 (Respondent) v. IBEW Local 115 (Intervener) (*Granted*)

0903-93-R: Bonnie Bryck (Applicant) v. United Steelworkers of America (Respondent) v. Guillevin International Inc. (Intervener) (*Granted*)

0904-93-R: Talfan Evans (Applicant) v. United Steelworkers of America (Respondent) v. Guillevin International Inc. (Intervener) (*Granted*)

DIRECTION RESPECTING UNLAWFUL LOCKOUT (INDUSTRIAL)

0917-93-U: International Association of Machinists and Aerospace Workers, Local 1168 (Applicant) v. Sola Canada, A Unit of General Signal Corporation (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0971-91-U: Heavy Machinists Classification (S.T.S.Z.) In General Motors of Canada Ltd. (Applicant) v. National Union C.A.W. & CAW Local 222 (Respondent) (*Dismissed*)

2255-91-U: Bev Thellefsen (Applicant) v. Benny Haulage Limited, Teamsters Local Union No. 879 (Respondents) (*Dismissed*)

2310-91-U: Terry Fraser, Terry Lewis, Peter Ronan, Hartley Scarrow (Applicants) v. The International Brotherhood of Electrical Workers Construction Council of Ontario (Respondent) v. The Electrical Trade

Bargaining Agency of the Electrical Contractors Association of Ontario, International Brotherhood of Electrical Workers (Intervenors) (*Withdrawn*)

3929-91-U: Ontario Public Service Employees Union (Applicant) v. St. Thomas-Elgin Association for Community Living (Respondent) (*Withdrawn*)

0628-92-U: Practical Nurses Federation of Ontario (Applicant) v. The Pembroke Civic Hospital (Respondent) (*Withdrawn*)

0922-92-U: Labourers' International Union of North America, Local 607 (Applicant) v. Petawawa Construction Co. Limited (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

1431-92-U: Steven Sheppard (Applicant) v. Brian Christie, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (Respondents) (*Granted*)

1651-92-U: Ralph Harrison (Applicant) v. Executive of Teamsters Local #230 - specifically Ben Loughlin, International Representative Matt Elliott (Respondents) v. The Electrical Power Systems Construction Association/Ontario Hydro (Intervenors) (*Withdrawn*)

1857-92-U: Greg Voutour (Applicant) v. Canada Pipe Company Limited and United Steelworkers of America, Local 8233 (Respondents) (*Terminated*)

2159-92-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - U.A.W. (Applicant) v. Morrison's Meat Packers Ltd. (Respondent) (*Granted*)

2288-92-U: Eric Rutitsky (Applicant) v. Canadian Union of Public Employees - CLC, Ontario Hydro Employees' Union, Local 1000, Ontario Hydro (Respondents) (*Dismissed*)

2727-92-U: Peter S. Stryjski (Applicant) v. R.W.D.S.U. Local 414 and A&P Dominion Stores (Respondents) (*Withdrawn*)

2879-92-U: D. Scott Pressello (Applicant) v. Canadian Auto Workers Union (Respondent) (*Withdrawn*)

3256-92-U: Jawed Zaidi (Applicant) v. International Association of Machinist and Aerospace Workers (Respondent) v. Dowty Canada Limited (Intervener) (*Withdrawn*)

3367-92-U: Commercial Graphics Limited (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) (*Dismissed*)

3436-92-U: Susan Cooper (Applicant) v. Canadian Union of Public Employees Local - 152 and Lincoln County Board of Education (Respondents) (*Terminated*)

3454-92-U; 3455-92-U; 3456-92-U; 3661-92-U: Giuseppina Colbertaldo (Applicant) v. Certified Brakes - United Steelworkers of America (Respondents); Tina Roma (Applicant) v. Certified Brakes - United Steelworkers of America (Respondents); Eva Leuzzi (Applicant) v. Certified Brakes (Respondent); Chiara Di Nunzio (Applicant) v. Certified Brakes - United Steelworkers of America (Respondents) (*Withdrawn*)

3466-92-U: Eric De Buda (Applicant) v. The Society of Ontario Hydro Professional and Administrative Employees and Ontario Hydro (Respondents) (*Dismissed*)

3472-92-U: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Marcor Personnel Inc. (Respondent) (*Withdrawn*)

3483-92-U: Geraldine Furry (Applicant) v. United Electrical, Radio and Machine Workers of Canada Local 555 (Respondent) v. Westinghouse Canada Inc. (Intervener) (*Dismissed*)

3568-92-U: B.C.T. Union Local 426 - Machine Operators (Applicant) v. B.C.T. Union (Local 426) (Respondent) v. Christie Brown & Co. (Intervener) (*Withdrawn*)

3642-92-U: Ontario Public Service Staff Union (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

3752-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Checker Limousine Air Airport Service (Respondents) (*Withdrawn*)

3824-92-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. DeBiasi & Associates (Respondent) (*Withdrawn*)

0012-93-U: Ontario Nurses' Association (Applicant) v. Porcupine Health Unit (Respondent) (*Withdrawn*)

0017-93-U: Roch St. Jacques (Applicant) v. Labourers' International Union of North America Local Union 493 (Respondent) (*Withdrawn*)

0025-93-U: Sheldon Martin (Applicant) v. Teamsters Union Local 419 (Respondent) v. Beaver Lumber Company Limited (Intervener) (*Dismissed*)

0029-93-U: Hotel Employees Restaurant Employees Union Local 75 (Applicant) v. Oliver's Brasserie Bofinger (Respondent) (*Withdrawn*)

0058-93-U: Independent Canadian Transit Union (Applicant) v. Sisters of Charity at Ottawa c.o.b. Saint-Vincent Hospital (Respondent) (*Withdrawn*)

0075-93-U: Ontario Public Service Employees Union (Applicant) v. Agape Group Homes Inc. (Respondent) (*Withdrawn*)

0085-93-U: Labourers' International Union of North America, Local 183 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent) v. Concorde Maintenance Corp. (Intervener) (*Withdrawn*)

0106-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. U-Need-A-Cab Limited (Respondent) (*Withdrawn*)

0107-93-U; 0108-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service (Respondent) (*Withdrawn*)

0133-93-U: Amrik Singh (Applicant) v. Cara Operations and Hotel Employees Restaurant Employees Union Local 75 (Respondents) (*Withdrawn*)

0140-93-U: United Brotherhood of Carpenters and Joiners of America Local Union 93 and Manuel Bettencourt (Applicants) v. Ellis-Don Construction Ltd., Rod Lasalle, Bellai Bros. (Ontario) Ltd. and Alfredo Carrozzi (Respondents) (*Withdrawn*)

0192-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service (Respondent) (*Withdrawn*)

0198-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 442714 Ontario Limited, A-Kwik Taxi Limited, Royal Taxi Limited, 9357772 Ontario Limited c.o.b. as "Royal Taxi" and/or "A-Kwik Royal Taxi" (Respondent) (*Withdrawn*)

0204-93-U: Hotel Motel and Restaurant Employees Union, Local 442 (Applicant) v. Maple Leaf Village Investments Incorporated (Respondent) (*Withdrawn*)

0219-93-U: Cameron MacPherson (Applicant) v. United Association of Journeymen and Apprentices of the

Plumbing and Pipe Fitting Industry of the United States and Canada (Respondent) v. Ontario Hydro and Electrical Power Systems Construction Association (Intervener) (*Withdrawn*)

0231-93-U: Friedrich Wolker representing 62 members of Local 414 (Applicant) v. New Dominion Stores, a division of the Great Atlantic and Pacific Company of Canada Limited and Retail, Wholesale and Department Store Union Local 414 (Respondents) (*Withdrawn*)

0240-93-U: IWA Canada, Local 2693 (Applicant) v. 549126 Ontario Limited, operating as Woodlands Inn (Respondent) (*Withdrawn*)

0260-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Norweld Oxygen Inc. (Respondent) (*Withdrawn*)

0282-93-U: Elizabeth Brule (Applicant) v. Canadian Union of Educational Workers (CUEW), Local 3, York University (Respondents) (*Withdrawn*)

0284-93-U: Service Employees International Union, Local 183 (Applicant) v. Meadowcroft Management Group c.o.b. as Briargate Retirement Living Centre (Respondent) (*Withdrawn*)

0288-93-U: Amalgamated Clothing and Textile Workers Union (Applicant) v. Hornco Plastics Inc. and Horn Plastics Ltd. (Respondents) (*Withdrawn*)

0310-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Nordik Windows Inc. (Respondent) (*Withdrawn*)

0320-93-U: Teamsters Local Union No. 419 (Applicant) v. Advanced Welding Supplies Limited (Respondent) (*Withdrawn*)

0323-93-U: Brian Grier (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

0342-93-U: Nadine Angela Chan (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW and Local 124) (Respondent) (*Withdrawn*)

0382-93-U: Shaun Allan Murray (Applicant) v. Teamsters Union Local 880 (Respondent) v. Maple Roll Leaf Company Ltd. (Intervener) (*Withdrawn*)

0433-93-U; 0434-93-U: Labourers' International Union of North America, Local 1089 (Applicant) v. 405730 Ontario Ltd. o/a The New Hiawatha Horse Park and Entertainment Centre (Respondent) (*Withdrawn*)

0436-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Reclamation Management Canada Ltd. (Respondent) (*Withdrawn*)

0448-93-U: Glass, Molders, Pottery, Plastics & Allied Workers International Union (Applicant) v. Peninsula Plastics Ltd. (Respondent) (*Withdrawn*)

0463-93-U: Thomas Girard (Applicant) v. Canadian Union of Public Employees Local 82 (Respondent) v. The Corporation of the City of Windsor (Intervener) (*Withdrawn*)

0501-93-U: Bruce McGaw (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

0518-93-U: Michael Bruen (Applicant) v. J.I. Case, United Steelworkers of America Local 2868, George Revill Maintenance Coordinator, Dave Brown Maintenance Foreman Joint Company Apprenticeship Committee (Respondents) (*Withdrawn*)

0544-93-U: Communications, Energy and Paperworkers Union of Canada, Local 593 (Applicant) v. Praxair Canada Inc. (Respondent) (*Withdrawn*)

- 0584-93-U:** International Union of Operating Engineers, Local 793 (Applicant) v. Con-Drain Company (1983) Ltd.; Con-Strada Construction Inc.; Tony DeGasperis; Jim DeGasperis (Respondents) (*Withdrawn*)
- 0590-93-U:** Labourers' International Union of North America, Local 1059 (Applicant) v. Formrydt Foundations (Respondent) (*Withdrawn*)
- 0591-93-U:** Elizabeth B. Gray (Applicant) v. Service Employees Union Local 663 (Respondent) (*Withdrawn*)
- 0596-93-U:** Denzil Hunnighan (Applicant) v. Joe McCabe, Ian Scott inclusive C.A.W. Local #512 (Respondent) v. Trane Canada (Intervener) (*Withdrawn*)
- 0598-93-U:** International Association of Machinists and Aerospace Workers, Local 1295 (Applicant) v. Gabriel of Canada Limited (Respondent) (*Withdrawn*)
- 0669-93-U:** Guardsman Products Ltd. (Applicant) v. Industrial and Commercial Workers Union (Respondent) (*Withdrawn*)
- 0703-93-U:** Labourers' International Union of North America, Local 183 (Applicant) v. Associated Paving Company Ltd. and/or Capobianco Management Limited and/or Associated Contracting Inc. and/or Rosalucia Landscaping Inc. and/or The Core Group Inc. and/or Capo Contracting Inc. (Respondents) (*Dismissed*)
- 0719-93-U:** Tony Grilo (Applicant) v. Hotel Employees Restaurant Employees Union (Local 75) (Respondent) (*Withdrawn*)
- 0729-93-U:** Service Employees' Union, Local 210 (Applicant) v. Weight Watchers (Essex) (Respondent) (*Withdrawn*)
- 0775-93-U:** Frankie G. Das (Applicant) v. Delta Chelsea Management, Jose Esqueda, Rajeev Khanduja, Hotel Employees Restaurant Employees Union, Local 75 (Respondents) (*Dismissed*)
- 0804-93-U:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Ontario Pro Welding Inc. and Marco Pollo (Respondent) (*Withdrawn*)
- 0849-93-U:** Michael De Pledge (Applicant) v. Sunworthy Wallcoverings (Respondent) (*Withdrawn*)
- 0859-93-U:** Service Employees International Union, Local 204 (Applicant) v. Sanitary Maintenance Systems (Respondent) (*Granted*)
- 0868-93-U:** Thomas Robert Nobles (Applicant) v. Belleville Professional Firefighters Association (Respondent) (*Dismissed*)
- 0870-93-U:** Labourers' International Union of North America, Local 183 (Applicant) v. Crystal Building Services Ltd. (Respondent) (*Withdrawn*)
- 0892-93-U:** Marianne Mason (Applicant) v. Baycrest Centre for Geriatric Care (Respondent) (*Dismissed*)
- 0919-93-U:** International Association of Machinists and Aerospace Workers, Local 1168 (Applicant) v. Sola Canada, A Unit of General Signal Corporation (Respondent) (*Withdrawn*)
- 0939-93-U:** Garry Golloher (Applicant) v. Jim Bridges, United Association of Plumbers & Steam Fitters (Respondents) (*Dismissed*)
- 0977-93-U:** Stephanie Chamberlain (Applicant) v. The Ottawa Sun (Division of the Toronto Sun Publishing Corp.), Scott Begbie and Rick Van Sickle (Respondents) (*Withdrawn*)
- 0990-93-U:** Sonja Laffrenier (Applicant) v. CAW Local 673 (Respondent) (*Withdrawn*)

1042-93-U: Association des Employés d'Ottawa-Carleton (Employés de bureau, de secretariat et employés techniques) (Applicant) v. Le Conseil Plénier du conseil scolaire de langue française d'Ottawa-Carleton (Respondent) (*Withdrawn*)

1049-93-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Canadian Call Processing Services Inc. (Respondent) (*Withdrawn*)

1083-93-U: Leo M. Labatt (Applicant) v. Employee of Sunnybrook Health Science Centre (Respondent) (*Dismissed*)

1086-93-U: Lorenzo Scalfari (Applicant) v. York University (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

0805-93-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Ontario Pro Welding Inc. and Marco Pollo (Respondent) (*Withdrawn*)

0858-93-M: Service Employees International Union, Local 204 (Applicant) v. Sanitary Maintenance Systems (Respondent) (*Granted*)

0918-93-M: International Association of Machinists and Aerospace Workers, Local 1168 (Applicant) v. Sola Canada, A Unit of General Signal Corporation (Respondent) (*Withdrawn*)

0976-93-M: Stephanie Chamberlain (Applicant) v. The Ottawa Sun (Division of The Toronto Sun Publishing Corp.), Scott Begbie and Rick Van Sickle (Respondent) (*Withdrawn*)

0999-93-M: Ontario Nurses' Association (Applicant) v. Omni Health Care Ltd. Riverview Manor Nursing Home (Respondent) (*Withdrawn*)

1032-93-M: Construction Workers Local 53, CLAC (Applicant) v. Pietro Electric Limited (Respondent) (*Granted*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2536-92-M: Doba Goodman (Applicant) v. Canadian Union of Educational Workers (Respondent Trade Union) v. York University (Respondent Employer) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0519-93-M: UniFirst Canada Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union Local 351 (Trade Union) (*Granted*)

0764-93-M: Oxford Picture Frame Co. Ltd. (Employer) v. International Union of Allied, Novelty and Production Workers, OFL-CIO, Local 905 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

1321-89-JD: Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 837 (Applicants) v. Ellis-Don Limited, Greenspoon Bros. Limited, The Metropolitan Toronto Demolition Contractors Inc., International Union of Operating Engineers, Local 793 (Respondents) (*Withdrawn*)

3384-90-JD: Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 527, Labourers' International Union of North America,

Local 506 (Applicants) v. International Union of Operating Engineers, Local 793, PCL Constructors Eastern Inc., Delsan Demolition Limited (Respondents) (*Withdrawn*)

0657-91-JD: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Kora Mechanical Inc., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Granted*)

0789-91-JD: Sayers & Associates Limited (Applicant) v. Sheet Metal Workers' International Association Local 30 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Respondents) v. Ontario Sheet Metal & Air Handling Group (Intervener) (*Granted*)

0875-91-JD: Harold R. Stark, Division of William Stark Group Inc. (Applicant) v. Sheet Metal Workers' International Association Local 392, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Respondents) v. Ontario Sheet Metal & Air Handling Group (Intervener) (*Granted*)

1670-91-JD: Sheet Metal Workers' International Association, Local 269 (Applicant) v. E.S. Fox Limited and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Granted*)

1687-91-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Sheet Metal Workers' International Association, Local 30, and English & Mould Ltd. (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3653-91-M: Ontario Public Service Employees Union (Applicant) v. The Salvation Army, Wycliffe Booth House (Respondent) (*Terminated*)

0639-92-M: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Thomson Newspapers Company Limited (The Globe and Mail Division) (Respondent) (*Withdrawn*)

3514-92-M: Canadian Union of Public Employees, Local No. 3166 (Applicant) v. The Halton Roman Catholic School Board (Respondent) (*Dismissed*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

August 1993



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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: RON LEBI

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Certification - Bargaining Unit - Practice and Procedure - Employer failing to file timely reply in accordance with Rules of Procedure - Board not permitting employer at hearing to place in issue whether analysts should be excluded from the bargaining unit - Certificate issuing

GALLUP CANADA INC.; RE USWA; RE GROUP OF EMPLOYEES 750

Certification - Collective Agreement - Parties - Reconsideration - Timeliness - Labourers' union seeking reconsideration of decision to grant early termination of collective agreement between CLAC and employer on ground that posting of Notice to Employees was inadequate - Labourers' union filing certification application in what would otherwise have been open period of collective agreement - Labourers' union having sufficient interest to justify granting standing in its own right to seek reconsideration of early termination decision - Board finding posting of Notice to Employees inadequate - Institutional interest of Board in providing adequate notice to affected employees outweighing reliance interest of company and CLAC on finality of Board's early termination decision - Reconsideration application allowed - Upon counting of ballots, Labourers' certification application dismissed

LEDCOR INDUSTRIES LIMITED; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA 758

Charter of Rights and Freedoms - Adjournment - Certification - Constitutional Law - Evidence - Natural Justice - Practice and Procedure - Representation Vote - Board declining to hear objecting employees' Charter argument where notice not given to Attorney-General - Board declining to adjourn hearing so that notice to Attorney-General could be given - Board applying *Hemlo Gold Mines* case and affirming that "application date" in section 8(4) of the Act means date on which application is filed and holding that this interpretation involves no denial of natural justice - Board declining to hear employees' *viva voce* evidence in connection with discretion to order representation vote - Board's discretion under section 8(3) of the Act should be exercised in way that recognizes that statutory scheme based primarily on documentary evidence of membership - Proffered evidence would not affect Board's discretion in circumstances of this case

SHAW INDUSTRIES LTD. C.O.B. AS CANUSA (A DIVISION OF SHAW INDUSTRIES LTD.); RE IWA - CANADA; RE GROUP OF EMPLOYEES..... 798

Collective Agreement - Certification - Parties - Reconsideration - Timeliness - Labourers' union seeking reconsideration of decision to grant early termination of collective agreement between CLAC and employer on ground that posting of Notice to Employees was inadequate - Labourers' union filing certification application in what would otherwise have been open period of collective agreement - Labourers' union having sufficient interest to justify granting standing in its own right to seek reconsideration of early termination decision - Board finding posting of Notice to Employees inadequate - Institutional interest of Board in providing adequate notice to affected employees outweighing reliance interest of com-

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- pany and CLAC on finality of Board's early termination decision - Reconsideration application allowed - Upon counting of ballots, Labourers' certification application dismissed
- LEDCOR INDUSTRIES LIMITED; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA 758
- Constitutional Law - Adjournment - Certification - Charter of Rights and Freedoms - Evidence - Natural Justice - Practice and Procedure - Representation Vote - Board declining to hear objecting employees' Charter argument where notice not given to Attorney-General - Board declining to adjourn hearing so that notice to Attorney-General could be given - Board applying *Hemlo Gold Mines* case and affirming that "application date" in section 8(4) of the Act means date on which application is filed and holding that this interpretation involves no denial of natural justice - Board declining to hear employees' *viva voce* evidence in connection with discretion to order representation vote - Board's discretion under section 8(3) of the Act should be exercised in way that recognizes that statutory scheme based primarily on documentary evidence of membership - Proffered evidence would not affect Board's discretion in circumstances of this case
- SHAW INDUSTRIES LTD. C.O.B. AS CANUSA (A DIVISION OF SHAW INDUSTRIES LTD.); RE IWA - CANADA; RE GROUP OF EMPLOYEES..... 798
- Construction Industry - Adjournment - Construction Industry Grievance - Interim Relief - Practice and Procedure - Board noting that real dispute concerning geographic jurisdiction and concomitant right to work under applicable ICI provincial agreement of Labourers' union locals 247 and 527 - Board adjourning proceeding and directing filing of detailed pleadings, including complete representations in support of the respective positions - Board issuing interim order under section 45(8) of the Act regarding right of certain contractors to assign work to members of locals 247 and 527 pending Board's final determination of grievance
- BELLAI BROTHERS LTD.; RE L.I.U.N.A., LOCAL 247; RE L.I.U.N.A., LOCAL 527 717
- Construction Industry - Adjournment - Damages - Discharge - Practice and Procedure - Parties - Remedies - Unfair Labour Practice - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union *animus* - Owner found personally liable for breaches of the Act in addition to breaches of the Act committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved
- CLASSIC MASONRY INC. AND LOUIS TRINDADE; RE B.A.C., LOCAL 5 721
- Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board rejecting Millwrights' union's assertion that jurisdictional dispute ought to be withdrawn or dismissed on basis that there was no longer a "demand" for work in dispute as a result of a settlement between employer and Ironworkers' union - Board dealing with entire chain of disputed work associated with material handling conveyor systems, including tagging, dismantling or disconnecting, the transporting of the dismantled systems, and their installation or reconnection at the new site - Board satisfied that correct assignment was to composite crew consisting of equal numbers of Ironworkers and Millwrights - Order to be binding upon all other jobs undertaken in the future in Board Area #1 - Board declining Ironworkers' request that orders be binding with respect to Board Areas #2 and #3
- COMSTOCK CANADA, A DIVISION OF LUNDRIGANS-COMSTOCK LIMITED, MILLWRIGHTS' DISTRICT COUNCIL OF ONTARIO, MILLWRIGHTS, LOCAL 1244, CJA, MILLWRIGHTS, LOCAL 1592, CJA; RE IRONWORKERS' DISTRICT COUNCIL OF ONTARIO AND BSOIW, LOCAL 700 740

Construction Industry Grievance - Adjournment - Construction Industry - Interim Relief - Practice and Procedure - Board noting that real dispute concerning geographic jurisdiction and concomitant right to work under applicable ICI provincial agreement of Labourers' union locals 247 and 527 - Board adjourning proceeding and directing filing of detailed pleadings, including complete representations in support of the respective positions -Board issuing interim order under section 45(8) of the <i>Act</i> regarding right of certain contractors to assign work to members of locals 247 and 527 pending Board's final determination of grievance	
BELLAI BROTHERS LTD.; RE L.I.U.N.A., LOCAL 247; RE L.I.U.N.A., LOCAL 527	717
Damages - Adjournment - Construction Industry - Discharge - Practice and Procedure - Parties - Remedies - Unfair Labour Practice - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union <i>animus</i> - Owner found personally liable for breaches of the <i>Act</i> in addition to breaches of the <i>Act</i> committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved	
CLASSIC MASONRY INC. AND LOUIS TRINDADE; RE B.A.C., LOCAL 5	721
Damages - Discharge - Duty of Fair Representation - Remedies - Unfair Labour Practice - Board earlier finding union in violation of duty of fair representation, but parties failing to agree on appropriate remedy -Reinstatement with compensation for nine months lost wages ordered - In assessing damages, Board not taking into account two-month delay in complaining to Board, but making deduction for failure to adequately mitigate and for complainant's admitted misconduct prior to discharge	
TIM TURNER; RE THE RETAIL, WHOLESALE BAKERY AND CONFECTION-ERY WORKERS UNION, LOCAL 461 OF THE R.W.D.S.U. AFL:CIO:CLC AND RICK KENT, ALF DAVIS, GARY SAGE, AB PLAYER; RE WESTON BAKERIES ...	811
Discharge - Adjournment - Construction Industry - Damages - Practice and Procedure - Parties - Remedies - Unfair Labour Practice - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union <i>animus</i> - Owner found personally liable for breaches of the <i>Act</i> in addition to breaches of the <i>Act</i> committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved	
CLASSIC MASONRY INC. AND LOUIS TRINDADE; RE B.A.C., LOCAL 5	721
Discharge - Damages - Duty of Fair Representation - Remedies - Unfair Labour Practice - Board earlier finding union in violation of duty of fair representation, but parties failing to agree on appropriate remedy -Reinstatement with compensation for nine months lost wages ordered - In assessing damages, Board not taking into account two-month delay in complaining to Board, but making deduction for failure to adequately mitigate and for complainant's admitted misconduct prior to discharge	
TIM TURNER; RE THE RETAIL, WHOLESALE BAKERY AND CONFECTION-ERY WORKERS UNION, LOCAL 461 OF THE R.W.D.S.U. AFL:CIO:CLC AND RICK KENT, ALF DAVIS, GARY SAGE, AB PLAYER; RE WESTON BAKERIES ...	811
Discharge - Discharge for Union Activity - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Whether declarations filed by the parties deficient - Board noting that where the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration -	

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Whether to reinstate union organizers accused by employer of theft pending final disposition of unfair labour practice complaint - Potential labour relations harm sought to be avoided by union significantly greater than potential harm to employer of temporary reinstatement - Interim reinstatement ordered	
EAST SIDE MARIO'S, 988421 ONTARIO INC. C.O.B. AS; U.F.C.W., LOCAL 175/633	744
Discharge for Union Activity - Discharge - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Whether declarations filed by the parties deficient - Board noting that where the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration - Whether to reinstate union organizers accused by employer of theft pending final disposition of unfair labour practice complaint - Potential labour relations harm sought to be avoided by union significantly greater than potential harm to employer of temporary reinstatement - Interim reinstatement ordered	
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Duty of Fair Representation - Damages - Discharge - Remedies - Unfair Labour Practice - Board earlier finding union in violation of duty of fair representation, but parties failing to agree on appropriate remedy - Reinstatement with compensation for nine months lost wages ordered - In assessing damages, Board not taking into account two-month delay in complaining to Board, but making deduction for failure to adequately mitigate and for complainant's admitted misconduct prior to discharge	
TIM TURNER; RE THE RETAIL, WHOLESALE BAKERY AND CONFECTIONERY WORKERS UNION, LOCAL 461 OF THE R.W.D.S.U. AFL:CIO:CLC AND RICK KENT, ALF DAVIS, GARY SAGE, AB PLAYER; RE WESTON BAKERIES ...	811
Duty of Fair Representation - Interim Relief - Remedies - Unfair Labour Practice - Applicant taxi drivers requesting order from Board preventing union from selling three taxi stand spots until complaint alleging breach of union's duty of fair representation decided - Applicants alleging potential harm to third parties if interim order not made - Board noting that harm to third parties would not in itself generally be sufficient to warrant granting interim order - Application dismissed	
SHARIAR NAMVAR AND MALIK AWADA; RE RWDSU, AFL:CIO:CLC AND BLUE LINE TAXI COMPANY LTD.	793
Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Complainant alleging that union's failure to arbitrate her grievance violating duty of fair representation - Board sketching out general framework within which complainant's rights must be determined - Board finding that union acted in good faith and that there was nothing arbitrary or discriminatory in the way union represented complainant - Complaint dismissed	
LEILA YATEMAN; RE CUPE, LOCAL 1974 ("THE UNION"); RE KINGSTON GENERAL HOSPITAL ("THE HOSPITAL")	777
Evidence - Adjournment - Certification - Charter of Rights and Freedoms - Constitutional Law - Natural Justice - Practice and Procedure - Representation Vote - Board declining to hear objecting employees' Charter argument where notice not given to Attorney-General - Board declining to adjourn hearing so that notice to Attorney-General could be given - Board applying <i>Hemlo Gold Mines</i> case and affirming that "application date" in section 8(4) of the Act means date on which application is filed and holding that this interpretation involves no denial of natural justice - Board declining to hear employees' <i>viva voce</i> evidence in connection with discretion to order representation vote - Board's discretion under section 8(3) of the Act should be exercised in way that recognizes that statutory scheme	

based primarily on documentary evidence of membership - Proffered evidence would not affect Board's discretion in circumstances of this case

SHAW INDUSTRIES LTD. C.O.B. AS CANUSA (A DIVISION OF SHAW INDUSTRIES LTD.); RE IWA - CANADA; RE GROUP OF EMPLOYEES..... 798

Interim Relief - Adjournment - Construction Industry - Construction Industry Grievance - Practice and Procedure - Board noting that real dispute concerning geographic jurisdiction and concomitant right to work under applicable ICI provincial agreement of Labourers' union locals 247 and 527 - Board adjourning proceeding and directing filing of detailed pleadings, including complete representations in support of the respective positions - Board issuing interim order under section 45(8) of the *Act* regarding right of certain contractors to assign work to members of locals 247 and 527 pending Board's final determination of grievance

BELLAI BROTHERS LTD.; RE L.I.U.N.A., LOCAL 247; RE L.I.U.N.A., LOCAL 527 717

Interim Relief - Bargaining Rights - Remedies - Union Successor Status - Alleged predecessor union resisting alleged successor union's application under section 63 of the *Act* claiming that it has bargaining rights for several thousand employees of grocery chain - Board directing that employees at each store to continue to be represented in their dealings with their employer by the individual union representatives who customarily dealt with employment problems prior to July 1993, pending the Board's determination concerning which union has bargaining rights- Board directing that copies of its decision be provided to all store managers and that copies be posted in each store

NEW DOMINION STORES, A DIVISION OF THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA, LIMITED; RE RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA, LOCAL 414, 422, 440, 461, 1000 AND THE RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA; RE RWDSU, AFL-CIO-CLC AND ITS LOCAL AFFILIATE RWDSU, AFL-CIO-CLC, LOCAL 414, 429, 545, 579, 582 AND 915 783

Interim Relief - Discharge - Discharge for Union Activity - Practice and Procedure - Remedies - Unfair Labour Practice - Whether declarations filed by the parties deficient - Board noting that where the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration - Whether to reinstate union organizers accused by employer of theft pending final disposition of unfair labour practice complaint - Potential labour relations harm sought to be avoided by union significantly greater than potential harm to employer of temporary reinstatement - Interim reinstatement ordered

EAST SIDE MARIO'S, 988421 ONTARIO INC. C.O.B. AS; U.F.C.W., LOCAL 175/633 744

Interim Relief - Duty of Fair Representation - Remedies - Unfair Labour Practice - Applicant taxi drivers requesting order from Board preventing union from selling three taxi stand spots until complaint alleging breach of union's duty of fair representation decided - Applicants alleging potential harm to third parties if interim order not made - Board noting that harm to third parties would not in itself generally be sufficient to warrant granting interim order - Application dismissed

SHARIAR NAMVAR AND MALIK AWADA; RE RWDSU, AFL:CIO:CLC AND BLUE LINE TAXI COMPANY LTD. 793

Jurisdictional Dispute - Construction Industry - Practice and Procedure - Board rejecting Millwrights' union's assertion that jurisdictional dispute ought to be withdrawn or dismissed on basis that there was no longer a "demand" for work in dispute as a result of a settlement between employer and Ironworkers' union - Board dealing with entire chain of disputed work associated with material handling conveyor systems, including tagging, dismantling or

disconnecting, the transporting of the dismantled systems, and their installation or reconnection at the new site - Board satisfied that correct assignment was to composite crew consisting of equal numbers of Ironworkers and Millwrights - Order to be binding upon all other jobs undertaken in the future in Board Area #1 - Board declining Ironworkers' request that orders be binding with respect to Board Areas #2 and #3

COMSTOCK CANADA, A DIVISION OF LUNDRIGANS-COMSTOCK LIMITED, MILLWRIGHTS' DISTRICT COUNCIL OF ONTARIO, MILLWRIGHTS, LOCAL 1244, CJA, MILLWRIGHTS, LOCAL 1592, CJA; RE IRONWORKERS' DISTRICT COUNCIL OF ONTARIO AND BSOIW, LOCAL 700.....

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Natural Justice - Adjournment - Certification - Charter of Rights and Freedoms - Constitutional Law - Evidence - Practice and Procedure - Representation Vote - Board declining to hear objecting employees' Charter argument where notice not given to Attorney-General - Board declining to adjourn hearing so that notice to Attorney-General could be given - Board applying *Hemlo Gold Mines* case and affirming that "application date" in section 8(4) of the Act means date on which application is filed and holding that this interpretation involves no denial of natural justice - Board declining to hear employees' *viva voce* evidence in connection with discretion to order representation vote - Board's discretion under section 8(3) of the Act should be exercised in way that recognizes that statutory scheme based primarily on documentary evidence of membership - Proffered evidence would not affect Board's discretion in circumstances of this case

SHAW INDUSTRIES LTD. C.O.B. AS CANUSA (A DIVISION OF SHAW INDUSTRIES LTD.); RE IWA - CANADA; RE GROUP OF EMPLOYEES.....

798

Parties - Adjournment - Build-Up - Certification - Representation Vote - Sale of a Business - Security Guards - Union making certification application in June 1993 in respect of employees of H - H's contract to provide security services not renewed and W providing those services effective July 1993 - W a successor employer within meaning of section 64.2 of the Act - Board permitting W to participate in certification proceeding over union's objection - Board declining to adjourn proceeding to allow union to investigate alleged "freeze" violation by W - Number of positions in bargaining unit increasing from 11 on certification application date to 13 on date of hearing - Board ruling that "build-up" principle not applicable in this case - W and H asking Board to direct representation vote on basis of change in composition of bargaining unit since application date - Employees at work on application date sufficiently representative of work force on hearing date that Board finding it appropriate to determine application based on assessment of wishes of those employees without representation vote - Interim certificate issuing

HAWK SECURITY SYSTEMS LTD.; RE USWA; RE WAKENHUT OF CANADA LIMITED.....

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Parties - Adjournment - Construction Industry - Damages - Discharge - Practice and Procedure - Remedies - Unfair Labour Practice - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union *animus* - Owner found personally liable for breaches of the Act in addition to breaches of the Act committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved

CLASSIC MASONRY INC. AND LOUIS TRINDADE; RE B.A.C., LOCAL 5

721

Parties - Certification - Collective Agreement - Reconsideration - Timeliness - Labourers' union seeking reconsideration of decision to grant early termination of collective agreement between CLAC and employer on ground that posting of Notice to Employees was inadequate - Labourers' union filing certification application in what would otherwise have been

open period of collective agreement - Labourers' union having sufficient interest to justify granting standing in its own right to seek reconsideration of early termination decision - Board finding posting of Notice to Employees inadequate - Institutional interest of Board in providing adequate notice to affected employees outweighing reliance interest of company and CLAC on finality of Board's early termination decision - Reconsideration application allowed - Upon counting of ballots, Labourers' certification application dismissed

LEDCOR INDUSTRIES LIMITED; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA

758

Practice and Procedure - Adjournment - Certification - Charter of Rights and Freedoms - Constitutional Law - Evidence - Natural Justice - Representation Vote - Board declining to hear objecting employees' Charter argument where notice not given to Attorney-General - Board declining to adjourn hearing so that notice to Attorney-General could be given - Board applying *Hemlo Gold Mines* case and affirming that "application date" in section 8(4) of the Act means date on which application is filed and holding that this interpretation involves no denial of natural justice - Board declining to hear employees' *viva voce* evidence in connection with discretion to order representation vote - Board's discretion under section 8(3) of the Act should be exercised in way that recognizes that statutory scheme based primarily on documentary evidence of membership - Proffered evidence would not affect Board's discretion in circumstances of this case

SHAW INDUSTRIES LTD. C.O.B. AS CANUSA (A DIVISION OF SHAW INDUSTRIES LTD.); RE IWA - CANADA; RE GROUP OF EMPLOYEES

798

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Interim Relief - Board noting that real dispute concerning geographic jurisdiction and concomitant right to work under applicable ICI provincial agreement of Labourers' union locals 247 and 527 - Board adjourning proceeding and directing filing of detailed pleadings, including complete representations in support of the respective positions - Board issuing interim order under section 45(8) of the Act regarding right of certain contractors to assign work to members of locals 247 and 527 pending Board's final determination of grievance

BELLAI BROTHERS LTD.; RE L.I.U.N.A., LOCAL 247; RE L.I.U.N.A., LOCAL 527

717

Practice and Procedure - Adjournment - Construction Industry - Damages - Discharge - Parties - Remedies - Unfair Labour Practice - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union *animus* - Owner found personally liable for breaches of the Act in addition to breaches of the Act committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved

CLASSIC MASONRY INC. AND LOUIS TRINDADE; RE B.A.C., LOCAL 5

721

Practice and Procedure - Bargaining Unit - Certification - Employer failing to file timely reply in accordance with Rules of Procedure - Board not permitting employer at hearing to place in issue whether analysts should be excluded from the bargaining unit - Certificate issuing

GALLUP CANADA INC.; RE USWA; RE GROUP OF EMPLOYEES

750

Practice and Procedure - Construction Industry - Jurisdictional Dispute - Board rejecting Millwrights' union's assertion that jurisdictional dispute ought to be withdrawn or dismissed on basis that there was no longer a "demand" for work in dispute as a result of a settlement between employer and Ironworkers' union - Board dealing with entire chain of disputed work associated with material handling conveyor systems, including tagging, dismantling or disconnecting, the transporting of the dismantled systems, and their installation or recon-

nection at the new site - Board satisfied that correct assignment was to composite crew consisting of equal numbers of Ironworkers and Millwrights - Order to be binding upon all other jobs undertaken in the future in Board Area #1 - Board declining Ironworkers' request that orders be binding with respect to Board Areas #2 and #3

COMSTOCK CANADA, A DIVISION OF LUNDRIGANS-COMSTOCK LIMITED, MILLWRIGHTS' DISTRICT COUNCIL OF ONTARIO, MILLWRIGHTS, LOCAL 1244, CJA, MILLWRIGHTS, LOCAL 1592, CJA; RE IRONWORKERS' DISTRICT COUNCIL OF ONTARIO AND BSOIW, LOCAL 700.....

740

Practice and Procedure - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Whether declarations filed by the parties deficient - Board noting that where the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration - Whether to reinstate union organizers accused by employer of theft pending final disposition of unfair labour practice complaint - Potential labour relations harm sought to be avoided by union significantly greater than potential harm to employer of temporary reinstatement - Interim reinstatement ordered

EAST SIDE MARIO'S, 988421 ONTARIO INC. C.O.B. AS; U.F.C.W., LOCAL 175/633

744

Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Complainant alleging that union's failure to arbitrate her grievance violating duty of fair representation - Board sketching out general framework within which complainant's rights must be determined - Board finding that union acted in good faith and that there was nothing arbitrary or discriminatory in the way union represented complainant - Complaint dismissed

LEILA YATEMAN; RE CUPE, LOCAL 1974 ("THE UNION"); RE KINGSTON GENERAL HOSPITAL ("THE HOSPITAL").....

777

Reconsideration - Certification - Collective Agreement - Parties - Timeliness - Labourers' union seeking reconsideration of decision to grant early termination of collective agreement between CLAC and employer on ground that posting of Notice to Employees was inadequate - Labourers' union filing certification application in what would otherwise have been open period of collective agreement - Labourers' union having sufficient interest to justify granting standing in its own right to seek reconsideration of early termination decision - Board finding posting of Notice to Employees inadequate - Institutional interest of Board in providing adequate notice to affected employees outweighing reliance interest of company and CLAC on finality of Board's early termination decision - Reconsideration application allowed - Upon counting of ballots, Labourers' certification application dismissed

LEDCOR INDUSTRIES LIMITED; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA

758

Remedies - Adjournment - Construction Industry - Damages - Discharge - Practice and Procedure - Parties - Unfair Labour Practice - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union *animus* - Owner found personally liable for breaches of the *Act* in addition to breaches of the *Act* committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved

CLASSIC MASONRY INC. AND LOUIS TRINDADE; RE B.A.C., LOCAL 5

721

Remedies - Bargaining Rights - Interim Relief - Union Successor Status - Alleged predecessor union resisting alleged successor union's application under section 63 of the *Act* claiming that it has bargaining rights for several thousand employees of grocery chain - Board directing that employees at each store to continue to be represented in their dealings with their

employer by the individual union representatives who customarily dealt with employment problems prior to July 1993, pending the Board's determination concerning which union has bargaining rights- Board directing that copies of its decision be provided to all store managers and that copies be posted in each store

NEW DOMINION STORES, A DIVISION OF THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA, LIMITED; RE RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA, LOCAL 414, 422, 440, 461, 1000 AND THE RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA; RE RWDSU, AFL-CIO-CLC AND ITS LOCAL AFFILIATE RWDSU, AFL-CIO-CLC, LOCAL 414, 429, 545, 579, 582 AND 915.....

783

Remedies - Damages - Discharge - Duty of Fair Representation - Unfair Labour Practice - Board earlier finding union in violation of duty of fair representation, but parties failing to agree on appropriate remedy -Reinstatement with compensation for nine months lost wages ordered - In assessing damages, Board not taking into account two-month delay in complaining to Board, but making deduction for failure to adequately mitigate and for complainant's admitted misconduct prior to discharge

TIM TURNER; RE THE RETAIL, WHOLESALE BAKERY AND CONFECTION-ERY WORKERS UNION, LOCAL 461 OF THE R.W.D.S.U. AFL:CIO:CLC AND RICK KENT, ALF DAVIS, GARY SAGE, AB PLAYER; RE WESTON BAKERIES ...

811

Remedies - Discharge - Discharge for Union Activity - Interim Relief - Practice and Procedure - Unfair Labour Practice - Whether declarations filed by the parties deficient - Board noting that where the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration - Whether to reinstate union organizers accused by employer of theft pending final disposition of unfair labour practice complaint - Potential labour relations harm sought to be avoided by union significantly greater than potential harm to employer of temporary reinstatement - Interim reinstatement ordered

EAST SIDE MARIO'S, 988421 ONTARIO INC. C.O.B. AS; U.F.C.W., LOCAL 175/633

744

Remedies - Duty of Fair Representation - Interim Relief - Unfair Labour Practice - Applicant taxi drivers requesting order from Board preventing union from selling three taxi stand spots until complaint alleging breach of union's duty of fair representation decided - Applicants alleging potential harm to third parties if interim order not made - Board noting that harm to third parties would not in itself generally be sufficient to warrant granting interim order - Application dismissed

SHARIAR NAMVAR AND MALIK AWADA; RE RWDSU, AFL:CIO:CLC AND BLUE LINE TAXI COMPANY LTD.

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Representation Vote - Adjournment - Build-Up - Certification - Parties - Sale of a Business - Security Guards - Union making certification application in June 1993 in respect of employees of H - H's contract to provide security services not renewed and W providing those services effective July 1993 - W a successor employer within meaning of section 64.2 of the *Act* - Board permitting W to participate in certification proceeding over union's objection - Board declining to adjourn proceeding to allow union to investigate alleged "freeze" violation by W - Number of positions in bargaining unit increasing from 11 on certification application date to 13 on date of hearing - Board ruling that "build-up" principle not applicable in this case - W and H asking Board to direct representation vote on basis of change in composition of bargaining unit since application date - Employees at work on application date sufficiently representative of work force on hearing date that Board finding it appropriate

to determine application based on assessment of wishes of those employees without representation vote - Interim certificate issuing

HAWK SECURITY SYSTEMS LTD.; RE USWA; RE WAKENHUT OF CANADA LIMITED.....

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Representation Vote - Adjournment - Certification - Charter of Rights and Freedoms - Constitutional Law - Evidence - Natural Justice - Practice and Procedure - Board declining to hear objecting employees' Charter argument where notice not given to Attorney-General - Board declining to adjourn hearing so that notice to Attorney-General could be given - Board applying *Hemlo Gold Mines* case and affirming that "application date" in section 8(4) of the Act means date on which application is filed and holding that this interpretation involves no denial of natural justice - Board declining to hear employees' *viva voce* evidence in connection with discretion to order representation vote - Board's discretion under section 8(3) of the Act should be exercised in way that recognizes that statutory scheme based primarily on documentary evidence of membership - Proffered evidence would not affect Board's discretion in circumstances of this case

SHAW INDUSTRIES LTD. C.O.B. AS CANUSA (A DIVISION OF SHAW INDUSTRIES LTD.); RE IWA - CANADA; RE GROUP OF EMPLOYEES.....

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Sale of a Business - Adjournment - Build-Up - Certification - Parties - Representation Vote - Security Guards - Union making certification application in June 1993 in respect of employees of H - H's contract to provide security services not renewed and W providing those service effective July 1993 - W a successor employer within meaning of section 64.2 of the Act - Board permitting W to participate in certification proceeding over union's objection - Board declining to adjourn proceeding to allow union to investigate alleged "freeze" violation by W - Number of positions in bargaining unit increasing from 11 on certification application date to 13 on date of hearing - Board ruling that "build-up" principle not applicable in this case - W and H asking Board to direct representation vote on basis of change in composition of bargaining unit since application date - Employees at work on application date sufficiently representative of work force on hearing date that Board finding it appropriate to determine application based on assessment of wishes of those employees without representation vote - Interim certificate issuing

HAWK SECURITY SYSTEMS LTD.; RE USWA; RE WAKENHUT OF CANADA LIMITED.....

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Security Guards - Adjournment - Build-Up - Certification - Parties - Representation Vote - Sale of a Business - Union making certification application in June 1993 in respect of employees of H - H's contract to provide security services not renewed and W providing those service effective July 1993 - W a successor employer within meaning of section 64.2 of the Act - Board permitting W to participate in certification proceeding over union's objection - Board declining to adjourn proceeding to allow union to investigate alleged "freeze" violation by W - Number of positions in bargaining unit increasing from 11 on certification application date to 13 on date of hearing - Board ruling that "build-up" principle not applicable in this case - W and H asking Board to direct representation vote on basis of change in composition of bargaining unit since application date - Employees at work on application date sufficiently representative of work force on hearing date that Board finding it appropriate to determine application based on assessment of wishes of those employees without representation vote - Interim certificate issuing

HAWK SECURITY SYSTEMS LTD.; RE USWA; RE WAKENHUT OF CANADA LIMITED.....

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Timeliness - Certification - Collective Agreement - Parties - Reconsideration - Labourers' union seeking reconsideration of decision to grant early termination of collective agreement between CLAC and employer on ground that posting of Notice to Employees was inadequate

quate - Labourers' union filing certification application in what would otherwise have been open period of collective agreement - Labourers' union having sufficient interest to justify granting standing in its own right to seek reconsideration of early termination decision - Board finding posting of Notice to Employees inadequate - Institutional interest of Board in providing adequate notice to affected employees outweighing reliance interest of company and CLAC on finality of Board's early termination decision - Reconsideration application allowed - Upon counting of ballots, Labourers' certification application dismissed

LEDCOR INDUSTRIES LIMITED; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA 758

Unfair Labour Practice - Adjournment - Construction Industry - Damages - Discharge - Practice and Procedure - Parties - Remedies - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union *animus* - Owner found personally liable for breaches of the *Act* in addition to breaches of the *Act* committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved

CLASSIC MASONRY INC. AND LOUIS TRINDADE; RE B.A.C., LOCAL 5 721

Unfair Labour Practice - Damages - Discharge - Duty of Fair Representation - Remedies - Board earlier finding union in violation of duty of fair representation, but parties failing to agree on appropriate remedy - Reinstatement with compensation for nine months lost wages ordered - In assessing damages, Board not taking into account two-month delay in complaining to Board, but making deduction for failure to adequately mitigate and for complainant's admitted misconduct prior to discharge

TIM TURNER; RE THE RETAIL, WHOLESALE BAKERY AND CONFECTION-
ERY WORKERS UNION, LOCAL 461 OF THE R.W.D.S.U. AFL:CIO:CLC AND
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Unfair Labour Practice - Discharge - Discharge for Union Activity - Interim Relief - Practice and Procedure - Remedies - Whether declarations filed by the parties deficient - Board noting that where the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration - Whether to reinstate union organizers accused by employer of theft pending final disposition of unfair labour practice complaint - Potential labour relations harm sought to be avoided by union significantly greater than potential harm to employer of temporary reinstatement - Interim reinstatement ordered

EAST SIDE MARIO'S, 988421 ONTARIO INC. C.O.B. AS; U.F.C.W., LOCAL 175/633 744

Unfair Labour Practice - Duty of Fair Representation - Interim Relief - Remedies - Applicant taxi drivers requesting order from Board preventing union from selling three taxi stand spots until complaint alleging breach of union's duty of fair representation decided - Applicants alleging potential harm to third parties if interim order not made - Board noting that harm to third parties would not in itself generally be sufficient to warrant granting interim order - Application dismissed

SHARIAR NAMVAR AND MALIK AWADA; RE RWDSU, AFL:CIO:CLC AND
BLUE LINE TAXI COMPANY LTD. 793

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Complainant alleging that union's failure to arbitrate her grievance violating duty of fair representation - Board sketching out general framework within which complainant's rights must be deter-

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mined - Board finding that union acted in good faith and that there was nothing arbitrary or discriminatory in the way union represented complainant - Complaint dismissed

LEILA YATEMAN; RE CUPE, LOCAL 1974 ("THE UNION"); RE KINGSTON
GENERAL HOSPITAL ("THE HOSPITAL").....

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Union Successor Status - Bargaining Rights - Interim Relief - Remedies - Alleged predecessor union resisting alleged successor union's application under section 63 of the *Act* claiming that it has bargaining rights for several thousand employees of grocery chain - Board directing that employees at each store to continue to be represented in their dealings with their employer by the individual union representatives who customarily dealt with employment problems prior to July 1993, pending the Board's determination concerning which union has bargaining rights- Board directing that copies of its decision be provided to all store managers and that copies be posted in each store

NEW DOMINION STORES, A DIVISION OF THE GREAT ATLANTIC AND
PACIFIC COMPANY OF CANADA, LIMITED; RE RWDSU, CANADIAN SERVICE
SECTOR DIVISION OF THE USWA, LOCAL 414, 422, 440, 461, 1000 AND THE
RWDSU, CANADIAN SERVICE SECTOR DIVISION OF THE USWA; RE RWDSU,
AFL-CIO-CLC AND ITS LOCAL AFFILIATE RWDSU, AFL-CIO-CLC, LOCAL 414,
429, 545, 579, 582 AND 915

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1167-92-G Labourers' International Union of North America, Local 247, Applicant v. **Bellai Brothers Ltd.**, Responding Party v. Labourers' International Union of North America, Local 527, Intervenor

Adjournment - Construction Industry - Construction Industry Grievance - Interim Relief - Practice and Procedure - Board noting that real dispute concerning geographic jurisdiction and concomitant right to work under applicable ICI provincial agreement of Labourers' union locals 247 and 527 - Board adjourning proceeding and directing filing of detailed pleadings, including complete representations in support of the respective positions - Board issuing interim order under section 45(8) of the *Act* regarding right of certain contractors to assign work to members of locals 247 and 527 pending Board's final determination of grievance

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Kobryn*.

APPEARANCES: *Laurence C. Arnold* and *Victor Claro* for the applicant; *Gary Burke*, *Michael S. Ruddy*, *Daniel Greco* and *Laird Rasmussen* for the responding party; *Daniel Randazzo* and *Berardino Carrozzi* for the intervenor.

DECISION OF THE BOARD; August 10, 1993

1. This is a referral to the Board of a grievance in the construction industry, pursuant to the provisions of section 126 of the *Labour Relations Act*.
2. The application was filed with the Board on July 13, 1992. Three separate times, hearing dates were scheduled by the Board and adjourned by the parties prior to the matter coming on for hearing before this panel on July 29, 1993.
3. The application, which was filed prior to the extensive revisions to the Board's Rules of Procedure effective January 1, 1993, reveals little of what appears to be the real dispute between the parties. It merely attaches a copy of a grievance letter which complains of a "failure to use members of Local 247 to perform work claimed by said Local."
4. From the response filed by the employer and the intervention filed by Labourers' International Union of North America, Local 527 ("Local 527"), and the representations of the parties at the July 29, 1993 hearing, it appears that the real dispute concerns the geographic jurisdiction and concomitant right to work under the applicable industrial, commercial and institutional provincial agreement of Locals 247 and 527 of the Labourers' International Union of North America. It appears that the employer employed members of Local 527 to perform certain work on the Waste Water Treatment Plant job site in the town of Kemptville, which work was performed between the first week of June, 1992 and December, 1992. The applicant ("Local 247") complains that the employer should have employed its members for that purpose.
5. At the hearing, Local 247 alleged that there was a patent or perhaps a latent ambiguity in the provincial agreement in that respect, and that it proposed to call evidence to establish that ambiguity or establish that the ambiguity should be resolved in its favour. Local 247 also made some general allegations concerning the manner in which it asserts the employer was induced to assign the work in question to members of Local 527.
6. The employer denied that it had violated the provincial agreement and submitted that Kemptville is not in the geographic jurisdiction of Local 247 under the provincial agreement. Local 527 supported the employer but did seem to concede that there is an ambiguity in the provincial

agreement. However, it asserted that any such ambiguity should be resolved against Local 247 in this case.

7. When the Board observed that there was nothing in Local 247's filings which contained any pleadings which raised or referred to any ambiguity in the provincial agreement, counsel reminded the Board that this application was filed prior to January 1, 1993 when the Board's new Rules of Procedure came into effect, and submitted that it had not then been necessary to file pleadings in that respect. In the alternative, counsel indicated that he would request an adjournment in order to permit the appropriate pleadings to be filed, which adjournment he said he wanted in any event because he was involved in the "social contract" negotiations.

8. The employer and Local 527 both opposed the adjournment. They submitted that the application should either be dismissed or proceed, which they were ready, willing and able to do.

9. Upon considering the materials filed and the representations of the parties, the Board ruled, orally, that the matter should be adjourned.

10. It has long been recognized that delay in labour relations matters is not a good thing (see *Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, [1977] 1 ACWS 817 (Ontario Court of Appeal), *Re United Headwear and Biltmore-Stetson (Canada) Inc.*, (1983) 40 O.R.(2d) 287). Delay in the resolution of labour relations matters is likely to create problems, and the Board and the Courts have long recognized that the speedy resolution of labour relations disputes is both in the public interest and in the interests of those directly involved or affected. Consequently, labour relations litigation is expected to be pursued diligently and within a reasonable time so that the matters in issue can be dealt with in a manner which is timely and fair to all concerned. This is particularly true in matters, like applications under section 126, which the *Labour Relations Act* specifically requires to be heard (or at least begun) in a reasonably expedited manner.

11. Subject to the rules of natural justice and fairness, the Board enjoys a broad discretion to determine whether and in what circumstances proceedings before it should be adjourned (*Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879*, (1979) 24 O.R.(2d)400 (Ontario Div. Court)). In recognition of the need to proceed with labour relations matters expeditiously, the Board's long established practice is not to grant adjournments except on consent of all parties, or when the Board is satisfied that there are extenuating circumstances such that an adjournment is appropriate. No party is entitled to an adjournment as a matter of right or convenience.

12. In this case, an adjournment was not appropriate merely because the applicant asked for one or because counsel was engaged in other matters. However, it was apparent that there was a real dispute concerning the interpretation and administration of the provincial collective agreement, that there may be an ambiguity in that provincial agreement, and that the Board may be called upon to revisit the issues dealt with in *M. Sullivan and Son*, [1986] OLRB Rep. Aug. 1110. That being the case, the Board concluded that it would not be appropriate to dismiss the application, even if the Board had the jurisdiction to do so at that point.

13. However, the Board was not satisfied that the pleadings were sufficient to permit the matter to proceed on July 29, 1993. Although this application was made prior to the Board's present Rules of Procedure coming into force on January 1, 1993, Rule 125 of the present rules provides that:

125. These Rules apply to all cases before the Board on the date these Rules come into force, unless the Board orders otherwise.

The Board has not declared that the present rules do not apply to this application. Nor does there appear to be any reason why they should not.

14. The Board's Rules require the parties to file detailed pleadings to provide a proper framework for the litigation of the dispute(s) between them. In this case, part of that framework is missing. Rather than proceeding with the application as pleaded and "letting the chips fall where they may" in the hearing, the Board concluded it would be appropriate to adjourn the matter and require the parties to plead the case properly. In coming to this conclusion, the Board considered the delay which had already occurred, and that on the current pleading that the real issue between the parties might not be appropriately addressed if at all.

15. The Board therefor adjourned the matter *sine die* to a date or dates to be set by the Registrar as *may* be directed by the Board. The Board directed Local 247 and Local 527 each to file and deliver to all their parties a complete and fully particularized statement of the facts upon which they rely in this matter, including the facts upon which they intend to rely with respect to any assertion of any ambiguity in the provincial collective agreement, and how that ambiguity should be resolved, together with complete representations or argument in support of their respective positions. The responding employer *may* make a written statement or submission in that respect as well. Any statement or submission filed pursuant to this direction must be received by the Board and the other parties by September 15, 1993 (a date agreed to by the parties). All parties will have 15 days from September 15, 1993 or the date all parties have made their initial filings, whichever comes first, to file a written reply.

16. The parties should understand that the Board may find it appropriate to dispose of this application on the basis of the materials filed with the Board prior to and pursuant to the Board's directions herein without a further hearing or opportunity for them to be heard. Any party which desires a hearing should expressly request one and specify why a hearing is necessary.

17. Given the nature of the dispute, and the time which had elapsed since it arose, the Board was not satisfied that the matter should necessarily be left at that. Section 126(3) of the Act provides that:

126. (3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 45(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Section 45(8) of the Act provide that:

45.- (8) An arbitrator or arbitration board shall make a final and conclusive settlement of the differences between the parties and, for that purpose, has the following powers:

1. To determine the nature of the differences in order to address their real substance.
2. To determine all questions of fact or law that arise.
3. To interpret and apply the requirements of human rights and other employment-related statutes, despite any conflict between those requirements and the terms of the collective agreement.
4. *To grant such interim orders, including interim relief, as the arbitrator or arbitration board considers appropriate.*

5. To enforce a written settlement of a grievance.

(emphasis added)

The Board therefor requested the submissions of the parties with respect to whether an interim order might be appropriate in this case.

18. Local 247 opposed any interim order on the basis that there was no precedent for such an order in a section 126 proceeding, and that such an order was unnecessary in this case. Local 527 and the responding employer agreed that an interim order was appropriate and specifically requested one in the form of the order which the Board suggested might be one possible option.

19. Upon hearing the representations of the parties, the Board declared that any contractor bound by the provincial collective agreement between the Labour Relations Bureau of the Ontario General Contractors Association; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; Concrete Floor Contractors Association of Ontario (the Employer Bargaining Agency), and the Labourers International Union of North America and the Labourers International Union of North America, Ontario Provincial Council, on behalf of its affiliate Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (that is, the provincial agreement), which has work on a job site at a location which that provincial agreement does not specifically and clearly place in the geographic jurisdiction of either Local 247 or Local 527, may assign the work covered by the provincial agreement to members of either Local 247 or Local 527 in its sole discretion, until such time as this application is finally disposed of or the Board otherwise orders. If this interim order causes any problems, any interested party may apply to the Board, in writing, for directions, or request that the order be varied.

20. In determining that this interim order was appropriate, the Board considered the delay in this proceeding, the nature of the dispute, the Board's decision in *M. Sullivan and Son, supra*, and the fact that the hearing did not proceed on July 29, 1993 primarily because of Local 247's apparent failure to plead this matter properly, even according to the Rules of Procedure in effect at the time the application was made.

21. In that respect also, the responding employer asked the Board to order Local 247 to pay its "costs of the day". Counsel advised the Board that the responding employer had incurred great expense in preparing for the hearing and in bringing himself and three witnesses from Ottawa, and submitted that in the circumstances, including the reasons why the matter was adjourned, a costs order was appropriate. Counsel requested that costs be fixed in the amount of \$7500.00.

22. Local 247 opposed this request as well. Local 247 submitted that such an order would be unprecedented and should not be made where, as here, the other parties had filed their pleadings late in the day and everyone had hoped and expected that the matter would not proceed to hearing. Local 247 submitted that if costs were awarded, Local 527 should pay half.

23. Local 527 submitted that there was no reason why it should pay any costs.

24. The Board reserved its decision on the issue of costs.

25. We note that in the course of the hearing on July 29, 1993, Local 247 received a fax from the Central Canada Sub-Regional Office of the Labourers International Union of North America. This fax was read to but not filed with the Board. It expressed the opinion the job site in issue in this case was in the geographic jurisdiction of Local 247. Local 247 submitted that this fax was dispositive of the matter. Local 527 and the responding employer did not agree. Neither did

the Board. This fax is no more than an unilateral expression of opinion by a party which did not take the trouble to formally intervene or participate in the proceeding. The dispute between the parties in this case has been put before the Board for resolution and it is now for the Board to determine it, unless the parties to the proceeding can agree to a disposition. A bald expression by the Labourers International Union of North America of its opinion on the matter is of little assistance.

26. This panel is seized.

3703-91-U International Union of Bricklayers and Allied Craftsmen, Local 5.
Applicant v. **Classic Masonry Inc.** and Louis Trindade, Responding Party

Adjournment - Construction Industry - Damages - Discharge - Practice and Procedure - Parties - Remedies - Unfair Labour Practice - Board denying adjournment where request coming in the form of fax to Board on eve of hearing accompanied by unsatisfactory, two-month old medical certificate - Board satisfied that lay-offs motivated, at least in part, by anti-union *animus* - Owner found personally liable for breaches of the *Act* in addition to breaches of the *Act* committed by corporate respondent - Corporate and individual respondents jointly and severally liable for damages assessed at over \$24,000 payable to union on its own behalf and on behalf of members who grieved

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

APPEARANCES: *M. Lewis* and *John Haggis* for the applicant; *Luis Trindade*, *Francisco Ferreira* and *Joaquim A. Pereira* for the responding party.

DECISION OF THE BOARD; August 4, 1993

1. This unfair labour practice complaint was filed with the Board pursuant to section 91 of the *Labour Relations Act* ("the Act") on February 20, 1992. In this complaint the applicant (hereinafter referred to as "Bricklayers" or "the Union") asserts that the respondents (hereinafter referred to as "Classic" and "Mr. Trindade") violated sections 3, 65, 67 and 71 of the Act.

2. This matter was heard by this panel of the Board on April 10, 1992, October 26, 1992 and May 17, 1993. Before proceeding with our determination of the merits of this complaint we find it appropriate to briefly outline the history of these proceedings.

History of Proceedings and the Adjournment Requests

3. This matter first came on for hearing before this panel on April 10, 1992. At that time (and having regard to the appearance information sheet filed by the respondents) the persons in attendance on behalf of the respondents were Luis F. Trindade, Francisco Ferreira and Joaquim Pereira. Throughout the hearing on that day only Mr. Trindade acted as spokesperson for the respondents.

4. On April 10, 1992, because none of these three individuals were lawyers, the Board explained the procedure typically followed in a hearing before the Board in alleged unfair labour practice complaints. The Board noted that there was no requirement that a person appearing

before the Board be represented by a lawyer. The Board explained, however, that the Board was responsible for adjudicating upon the complaint and that it would be inconsistent with our role as adjudicators to give advice to any party appearing before the Board or to otherwise act as an advocate for a party merely because that party had chosen not to retain counsel. The Board noted that any consequences flowing from the respondents' decision not to retain counsel would have to be borne by the respondents. The respondents were responsible for the presentation of their case and would have to decide such things as which witnesses to call, the questions to be asked of those witnesses, the cross-examination of the trade union's witnesses, etc.

5. During the course of the hearing on April 10, 1992 Mr. Trindade adopted the position that he did not speak on behalf of Classic. During his cross-examination by counsel for the trade union Mr. Trindade testified that he had nothing to do with Classic, that he held no position with that company, and that the company was owned by his wife Mary Trindade. He further testified that his only involvement with Classic was through a company owned by Mr. Trindade which rents materials (fork-lifts, scaffolding, etc.) to Classic. Mr. Trindade testified his company also rented similar material to Armour Masonry and other companies.

6. As a result of Mr. Trindade's position that he did not speak on behalf of Classic, and in view of the fact that neither Mr. Ferreira nor Mr. Pereira spoke during the course of the hearing, Classic was not represented during the hearing. We note that during the hearing Mr. Ferreira was identified as the general foreman or supervisor in charge of the site during the time the unfair labour practices were alleged to have occurred. Mr. Pereira was also identified as a "foreman-blockcounter" on that site. As no one appeared on behalf of Classic on that day (nor on any subsequent days of hearing) there was no evidence from Classic (save Mr. Trindade's personal evidence) to defend or refute the allegations of the union.

7. Mr. Trindade had been served with a summons *duces tecum* by the union. As a result on April 10 Mr. Trindade brought with him certain payroll records of Classic. Mr. Trindade however professed to have no knowledge of these records and stated he could not explain any of them. As a result the union's cross-examination of Mr. Trindade on that day was adjourned to enable the parties the opportunity to examine the documents. The hearing continued on October 26, 1992.

8. On October 26, 1992 only Mr. Trindade was in attendance on behalf of any of the respondents. The trade union finished its cross-examination of Mr. Trindade on that day. Thereafter, Mr. Trindade stated that he had "nothing further to say" and he was prepared to "let the Board decide" upon the merits of the complaint. No other evidence on behalf of the respondents was tendered. Counsel for the union proceeded with the presentation of the union's case.

9. The matter was to continue on October 30, 1992 and November 9, 1992. On October 28, 1992 Mr. Trindade was in a car accident. On October 29, 1992 he faxed to the Board a note stating:

"To: Ontario Labour Board

Attention: T. A. Inniss

Please note due to a car accident I am unable to attend tomorrow Oct. 30/92. Please inform me as to when the next hearing will take place. Following is a note from my family physician."

The accompanying note from his family physician is dated October 29, 1992 and states:

"To Whom It May Concern:

Mr. Trindade is not fit to attend meetings before Nov. 6/92."

10. By fax dated November 5, 1992 (received by the Board on November 6, 1992) Mr. Trindade advised:

"This is inform you that I am not well enough to attend the hearing on Monday, Nov. 9/92. Please inform me as to when the next hearing will take place. Following is a note from my family physician."

The physician's note is dated November 5, 1992 and states:

"May not attend meeting until after November 23, 1992."

11. As a result the parties were advised by notice from the Registrar dated November 6, 1992 that the hearing scheduled for November 9, 1992 was adjourned. By further notice from the Registrar dated November 18, 1992 the parties were advised that the hearing in this matter had been rescheduled to take place on Monday, May 17, 1993 and Tuesday, May 18, 1993.

12. On Friday, May 14, at 4:23 p.m. Mr. Trindade faxed to the Registrar a letter as follows:

"Re: File No. 3703-91-U,

Attached is a letter from my doctor explaining my health condition."

13. The accompanying letter from the doctor is dated March 23, 1993, is addressed to Mr. Ken Petryshen (another Vice-Chair at the Board) and states:

"I am writing to inform you that Mr. Trindade suffers from a significant back injury related to a motor vehicle accident that occurred October 28, 1992. His most serious injury was to his lower back. He suffers from a herniated disc in the lower spine causing irritation of a nerve that feeds his left leg. As a result he has severe pain and significant weakness in that leg and his lower back. He has been receiving treatment since the accident and continues to do so. His progress, as in so many of these cases, has been slow.

This gentleman has been advised to greatly restrict his activities and must rest a good portion of every day. He is clearly and unequivocally unable to participate in any hearings and/or proceedings at this time due to his injuries.

Hopefully in the next six months he will make some significant progress to enable him to attend but we will have to evaluate his progress with time.

Sincerely

Dr. H.A. Rafla M.D., C.C.F.P.

14. At the commencement of the hearing on Monday, May 17, 1993 this correspondence was brought to the attention of the union. Counsel for the union had not been contacted by Mr. Trindade and had not been advised that Mr. Trindade would not be attending the hearing. The Board briefly adjourned the hearing and waited its customary one-half hour to see if either Mr. Trindade or a representative on his behalf would attend before the Board that day. When the hearing was reconvened at 10 o'clock the Board advised counsel for the union that it would treat Mr. Trindade's correspondence as a request for an adjournment. Counsel indicated that the union opposed the adjournment request.

15. In opposing the adjournment request counsel for the trade union argued that the note from the doctor was the same note placed before another panel of the Board (the Petryshen panel) in another proceeding involving Mr. Trindade and/or Classic. In that proceeding Mr. Trindade and

Classic were represented by counsel. Before the Petryshen panel Mrs. Mary Trindade stated that her husband was not confined to bed and was able to move around. Counsel asserted that before the Petryshen panel the trade union advised both Mrs. Trindade and counsel acting on behalf of the Trindade's and Classic that the union was quite prepared to agree to all reasonable accommodations including frequent or extended breaks, special chairs, etc. to assist in making Mr. Trindade comfortable while the hearing progressed. Counsel also advised that during the course of the hearing before the Petryshen panel the union informed counsel opposite that if further adjournments of Board proceedings were to be requested on the basis of Mr. Trindade's medical condition the union would insist on further and better medical evidence.

16. In these circumstances counsel for the union argued before us that it was simply inadequate for Mr. Trindade to fax to the Board a two-month old medical certificate. Mr. Trindade should not assume that he would automatically be granted an adjournment. His decision not to attend either personally or through counsel to speak to the matter of an adjournment should not prevent the Board from dealing with it. He submitted that in the circumstances the adjournment should be denied.

17. After recessing for some time to consider the matter the Board returned and rendered its unanimous oral ruling that it would not adjourn the hearing.

18. In the circumstances of his case we agree with counsel's submissions that it is simply not good enough for a party litigant to fax to the Board on the eve of the scheduled hearing date a medical certificate nearly two months old and then assume an adjournment will be forthcoming. The medical certificate does not indicate Mr. Trindade's current condition or restrictions. The letter itself indicates that Mr. Trindade's condition may improve after March 23 when it states "Hopefully in the next six months he will make some significant progress to enable him to attend". The medical certificate explains that his progress will have to be evaluated "with time". A more recent, accurate and detailed statement of Mr. Trindade's medical condition and assessment is warranted in the circumstances.

19. The concept of labour relations delayed is labour relations defeated and denied is well-established. In this case the unfair labour practice complaint has been outstanding in excess of one year. The hearing had been adjourned for some six months since Mr. Trindade first advised the Board that he was unable to attend for medical reasons. Mr. Trindade had finished his evidence and had indicated he had "nothing further to say". The responding parties had closed their case. There was nothing before the Board to indicate Mr. Trindade could not have retained or instructed counsel or an agent to appear on his behalf to speak to the matter of an adjournment or to continue with the case if an adjournment was not granted. In all of the circumstances the Board determined that there was insufficient material before it to grant the adjournment -- an adjournment opposed by the complainant trade union and one which would prejudice the individual grievors.

The evidence with respect to the merits of the complaint.

20. We heard the *viva voce* evidence of five witnesses, Mr. Luis Trindade, Mr. Carlos Braga, Mr. Mario Salgado, Mr. Jose Braga, and Mr. John Haggis. In addition various documents including the payroll records of Classic were tendered as evidence. As is typical in unfair labour practice complaints, credibility is a critical issue and in the circumstances of this case merits further and detailed consideration.

21. We did not find Mr. Trindade to be a truthful witness. Mr. Trindade had what can only be described as a "convenient" memory and a "selective" knowledge of events or the affairs and operations of Classic. As a result Mr. Trindade's evidence lacked candour and reliability. Mr. Trin-

dade's evidence was in and of itself inconsistent and contradictory. It was also contradicted by the other witnesses and the documentary evidence.

22. A single example of Mr. Trindade's evidence will serve to highlight the difficulty facing the Board when weighing his evidence. This example is also critical to determining the merits of the union's complaint against Classic and Mr. Trindade and therefore requires some elaboration.

23. Both in his opening submissions to the Board and in his examination-in-chief Mr. Trindade provided detailed, and on their face plausible reasons for the lay off of the grievors. These reasons related to the seniority of the grievors, a lack of work at the project, and the comparative skill of the employees as bricklayers working with either "block" or "brick". Mr. Trindade stated the layoffs were unrelated to any union activities. The cross-examination of Mr. Trindade and the evidence of the other witnesses however seriously impaired the truthfulness of these statements.

24. Mr. Trindade was the first and only witness called by the respondents. He commenced his testimony on April 10, 1992. After being sworn Mr. Trindade was simply advised to tell "his side of the story", to address the issues raised by the union in its complaint, and to tell the Board the matters which he considered were relevant to the Board's determination of this complaint. In his examination-in-chief Mr. Trindade testified essentially to the following facts.

25. At the time of the union's organizing campaign Classic was engaged inter alia at a job site at the Stoney Brook Heights Public School in London, Ontario ("Stoney Brook site"). On February 17, 1992 (in or about the time Classic received notice of the union's application for certification) a number of employees were laid off from that job. Mr. Trindade testified that the reason for the lay off was that the "floor wasn't poured" and there "was not enough room for everyone to work". It was his evidence-in-chief that he went to the job and told Joaquim Pereira that "if there were too many people on site he had to tell the foreman to lay off the youngest workers he hired". By "youngest workers" Mr. Trindade meant those employees with the least amount of seniority with Classic.

26. Mr. Trindade continued to add "so Joaquim Pereira asked the foreman to ask the youngest workers [to go home] for a few days or weeks until [we were] ready to call back". Mr. Trindade added that he personally told two of the workers (Arlinda Pimentele and John Ferreira) that the layoff was "only temporary until we got more work and go have a job for [them] to come back".

27. In addressing those aspects of the complaint in which the union asserted other employees were brought to the Stoney Brook site after these employees had been laid off from that site. Mr. Trindade testified that "the reason we took the other crew for the brick was because I promised the foreman on site he would have another crew for the brick but they were working on another site at the time". Mr. Trindade stated "I promised the super on the site a few times we were going to bring another crew and I said when we finished the other job I'll bring the other crew". As a result when Classic's job at its residential sites in Kitchener (Monarch Homes) and Ayr (Starkwest Homes) were finished the "brick" crews from those locations were brought to work at the Stoney Brook site.

28. Mr. Trindade testified that Classic had separate "brick" and "block" crews i.e., persons who worked primarily with exterior brick or persons who worked primarily with concrete blocks. The persons who were laid off by Classic in February 1992 were all members of the "block" crew. The persons transferred from Classic's residential sites on the other hand were all members of the "brick" crew. Mr. Trindade testified that after the layoff there were no new employees hired to do block work at the Stoney Brook site. Only brick work was done by employees new to that site and

even these employees were subsequently laid off or transferred when the weather became too cold to do the brick work.

29. Mr. Trindade testified that Classic had been in business since 1986. Since that time Classic had generally operated with such separate crews. He indicated that if one or the other crews was “behind and needed more people we do [transfer] them but if we have another job to go to then we move the brick crew out”.

30. Mr. Trindade testified that because the brick crew was transferred to the Stoney Brook site it “gave the opportunity for the block crew to stay a few more days with the job”. He concluded his evidence on April 10, 1992 by noting that the brick crew would leave the Stoney Brook job site the following week (i.e. the week commencing April 13, 1992) but added that the brick work at the site had not yet finished. We note parenthetically that by the time of the first scheduled hearing day all of the laid off grievors had been recalled to work.

31. Mr. Trindade also testified about the importance of seniority at Classic. He stated “we always look at older workers in the company and we try to keep those people first”. He tendered two typewritten lists (Exhibits 1 and 2) which purport to set out the seniority of the employees.

32. In concluding his evidence-in-chief on April 10, 1992 therefore, it was Mr. Trindade’s testimony that it was these various factors which led to the layoff of the employees of the block crew in February 1992. The job was “not ready for them” and as a result some employees had to be laid off. There was brick work that could be done and was in fact done by employees who had been transferred to the site from Classic’s residential job sites. Block work was not however done by these employees. In any event the employees transferred generally had greater seniority.

33. In the face of that testimony-in-chief (which was consistent with Mr. Trindade’s opening statements to the Board) Mr. Trindade’s testimony during cross-examination was therefore particularly troublesome.

34. Thus, for example, during his cross-examination on April 10, Mr. Trindade stated that he had nothing to do with Classic other than the fact that his company rented material such as fork-lifts and scaffolding to Classic. In view of the fact that he had nothing to do with Classic, Mr. Trindade indicated that he was unable to answer any questions concerning the payroll records he had produced pursuant to the summons *duces tecum*. Looking at those records, for example, he could not indicate which employees were at work at various times, or at which job sites they were working, when employees were transferred, etc. The parties including Mr. Trindade therefore spent the remainder of the hearing day examining Classic’s records.

35. Mr. Trindade’s cross-examination continued on October 26 1992. At that time Mr. Trindade continued in his inability or unwillingness to answer questions concerning Classic’s payroll records. He reiterated his position that he had nothing to do with Classic and had resigned his position with the company October 19, 1991. As a result he didn’t hire, fire, lay off employees, nor did he “run” or “organize” any jobs or crews for Classic. Mr. Trindade was quite vehement that he was “not involved” with Classic. As a result he did not even know when the job at the Stoney Brook site commenced.

36. Notwithstanding his earlier evidence-in-chief with respect to Classic’s separate block and brick crews and the transfer of the brick crew from Classic’s residential sites to the Stoney Brook site, in cross-examination Mr. Trindade testified that he had no personal knowledge how Classic was organizing the job, which crews were going to work on the job, who worked at the site (with the exception of the foreman) or even whether the persons he saw when he occasionally

delivered material to the site were working for Classic. Of the people on-site whom he knew "from before", Mr. Trindade stated "I don't know exactly why they were there." In this regard, during his cross-examination Mr. Trindade testified he only went to the job site three, four, or five times to deliver material, that he occasionally spoke to the people working there whom he knew, and that he generally only stayed at the site for 30 minutes or so (although that was subsequently altered to perhaps as much as one or two hours).

37. Mr. Trindade also testified that he was unaware of any union activity or the union affiliation of any Classic employees. As a result, although Mr. Trindade acknowledged that he and his wife Mary, the President of Classic, had more than a business relationship and naturally talked to each other, he could not explain why his wife might think that he knew certain Classic employees were union members. It was Mr. Trindade's evidence during cross-examination that he was unaware of any union activity until *after* he had posted the notices of the application for certification. He posted these notices only because "Mary gave them to me to post and that's the first I knew about it" [the union's organizing attempts]. Mr. Trindade was adamant that before that event he was not aware which Classic employees were members of the union. As a result he could not explain why in response to the application for certification and the unfair labour practice complaint the reply signed and filed by his wife in early March 1992 states:

"Luis was and is aware that some of the employees were or are Union members since he worked with them on other jobs. He doesn't care whether they are or aren't as long as they do their job."

38. We note that the reply also asserts that "... Luis Trindade knows that the schedule called for work to be completed by the end of March giving it a duration of approximately sixteen weeks and he knows that Classic has no other job in London". This pleading is completely contrary to Mr. Trindade's position that he was not involved with Classic and that since his resignation he has had essentially nothing to do with Classic and had little knowledge about its jobs and day to day operations.

39. Having regard to the entirety of Mr. Trindade's evidence, his demeanour throughout, his evasiveness during cross-examination and the contradictions within his own evidence we have concluded that Mr. Trindade's evidence was at best self-serving and on the whole simply cannot be believed. In view of the lack of credibility of Mr. Trindade's evidence, wherever his evidence was in conflict with that of the other witnesses, the evidence of the other witnesses is to be preferred.

40. Thus we accept and find that at all relevant times (and notwithstanding the fact that he may not technically have been an Officer, Director or employee of Classic) Mr. Trindade was in fact acting on behalf of Classic. We accept for example Mr. Jose Braga's evidence that at the time of his layoff he was advised that the lay-offs were in accordance with the list which Mr. Trindade had given the supervisory personnel at the Stoney Brook site. We also accept Mr. Mario Salgado's evidence that at the end of November or early December 1991 (a time when Mr. Trindade states he had already resigned from Classic and was according to his own testimony no longer "involved" with Classic) it was Mr. Trindade who told him he was going to be transferred to the job in London at the Stoney Brook site. Similarly we accept Mr. Carlos Braga's evidence that he obtained work at the Stoney Brook site after he called Mr. Trindade in December 1991 and was told by Mr. Trindade that he could start at the site as soon as Classic's crew came to London to start the job (a time which the company's payroll records indicates was early January 1992). We find that these various actions by Mr. Trindade were done on behalf of Classic and belie Mr. Trindade's assertions that he had nothing to do with Classic and did not hire, fire, or lay off employees.

41. As credibility is a critical aspect of this case we turn to briefly examine the remainder of the evidence of the witnesses called by the union.

42. Jose Braga testified that he was hired by Classic to work on the Stoney Brook site just before Christmas 1991. Mr. Braga said he actually commenced work at the site the first week in January 1992. Mr. Braga was hired by his brother-in-law Francisco Ferreira who was the general foreman at the site. Prior to being hired Mr. Ferreira advised Mr. Braga that he (Mr. Ferreira) would first have to speak to Mr. Trindade. Mr. Braga thinks of Mr. Trindade as the owner of Classic. While on the job Mr. Braga laid both brick and block. Mr. Braga's experience with Classic was that employees performed both brick and block work. He testified there were no separate brick or block crews on the Stoney Brook job.

43. While working at the Stoney Brook site Mr. Braga saw Mr. Trindade on several occasions. On one occasion prior to his layoff Mr. Trindade spoke to him about the union. At that time Mr. Trindade asked Mr. Braga about his hourly rate. Mr. Trindade told Mr. Braga "he's been getting pressure from the union and the Board of Education to pay union wages". Although Mr. Trindade initially indicated to Mr. Braga his rate would not be increased, Mr. Trindade subsequently returned, wrote a new hourly rate on a piece of paper and told Mr. Braga that that would be his new rate. He also told Mr. Braga to keep the matter quiet and not tell other employees.

44. Mr. Jose Braga was laid off at the end of the work day on Monday February 17, 1992. He was advised of his layoff by Mr. Joaquim Pereira who indicated that the layoff was due to a lack of work. However, when Mr. Braga spoke to his brother-in-law Mr. Ferreira (the person in charge of the site) Mr. Ferreira indicated that he did not know why people were being laid off.

45. Contrary Mr. Trindade's evidence Mr. Braga specifically recalled seeing Mr. Trindade at the job site on the day that he was laid off. It was Mr. Braga's evidence that on that day he was working on an exterior block wall, and that the wall was not yet completed at the time of his layoff.

46. The vast majority of Mr. Braga's evidence was not seriously challenged by Mr. Trindade during his cross-examination of Mr. Braga.

47. Mr. Mario Salgado also worked at the Stoney Brook site for Classic. Prior to working at Stoney Brook Mr. Salgado had worked at another school project in Cambridge. It was his evidence that while working in Cambridge Mr. Trindade advised the employees "You guys are lucky. You go back to London. Maybe we get problems with the union but if the union guy shows up there just tell him to go away and don't sign anything."

48. Mr. Salgado also testified that while working for Classic he laid both blocks and brick. Like Mr. Jose Braga he was unaware of any separate crews and testified that in his experience Classic employees did both types of work.

49. Mr. Salgado was laid off on February 17 by Joaquim Pereira. Mr. Salgado was not given any reason for the layoff by Mr. Pereira other than that he was "on the list to go" and "Mr. Luis [Trindade] said you have to go". At the time of his layoff Mr. Salgado also had not finished the wall on which he was working.

50. Mr. Carlos Braga's evidence about the operations of Classic was not materially different than those of his brother Jose Braga or Mr. Mario Salgado and need not be repeated. Mr. Carlos Braga had worked for Classic before starting work at the Stoney Brook site in early January 1992. Indeed he had been laid off from Classic in early December 1991 and upon finding out about the

Stoney Brook site called Mr. Trindade to inquire about work. Mr. Trindade told him that as soon as the crew was back in London he “can start anytime”.

51. In direct contradiction to Mr. Trindade’s evidence that he did not know if any employees of Classic were union members, Mr. Braga testified about a conversation he had with Mr. Trindade while working at another Classic site in the summer of 1991. During the course of that conversation Mr. Trindade asked Mr. Braga if he was a member of the union to which Mr. Braga replied that he had been a union member for six years. In addition Mr. Braga testified that while at the Stoney Brook site and prior to his layoff on February 17, 1992, Mr. Trindade spoke to him and asked whether John Haggis (Business Manager for the union) had been at the site. Carlos Braga testified that on that occasion Mr. Trindade “said the union was after him”.

52. Similarly, Mr. Carlos Braga testified that while working at the Stoney Brook site he also received a raise from Mr. Trindade “because they’re after me”. On the the occasion of his raise Mr. Trindade wrote Mr. Braga’s new pay rate on a piece of paper and gave it to him. Mr. Braga assumed the reference to “they” in Mr. Trindade’s statement was the union and the government because Mr. Trindade spoke of a letter he had received concerning the wages paid to employees.

53. Mr. Braga was also recalled to work. He did not, however, receive his pay cheque for the last week he worked for Classic prior to his lay off. In this unfair labour practice complaint he seeks damages not only for the wages he lost while laid off but also for the 37 1/2 hours of pay still owing to him by the company.

54. We also heard the evidence of John Haggis, the Business Manager for Bricklayers Local 5. His evidence dealt primarily with the efforts of the union in enforcing what Mr. Haggis referred to as the “Provincial Fair Wages Policy” because the school was a government funded facility. (Mr. Haggis was obviously referring to the *Government Contracts Hours and Wages Act*, R.S.O. 1990 Chap. G.8). Mr. Haggis testified about the letters sent by the union to Classic, the School Board and the general contractor on site to ensure that the standard “fair wage” for the London area was paid to the Bricklayers employed on site.

Decision

55. Within this factual framework we now turn briefly to examine the law. The sections which the union asserts the respondents have violated state as follows:

65. No employer or employers’ organization and no person acting on behalf of an employer or employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer’s freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

As a result, the union seeks damages on its own behalf and on behalf of the individual grievors named in the complaint.

56. In a complaint of this nature the provisions of section 91(5) apply. That section provides:

91.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

57. The burden of proof is therefore on the responding parties to show, on the balance of probabilities, that the layoff of the grievors was not related to union activity or motivated by anti-union animus.

58. In *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665 at page 673 the Board explained the burden of proof in the following terms:

"Having regard to section 79(4a) [now section 91(5)] a respondent employer must satisfy the Board that in taking the actions it took it was in no way motivated by a grievor's union activity. Thus the Board may not find that an employer's sole reason for acting stems from the union activity of his employees to find a violation of legislation but rather an employer must satisfy the Board that the union activity played neither a major or minor role in regard to its impugned actions."

59. In assessing whether the respondent's actions were a violation of the Act we must look to all the circumstances surrounding the layoffs. An examination of all the circumstances is not to determine whether there is just cause for the layoffs, whether the layoffs were "fair" or "unfair" in some objective sense, or whether there was a legitimate business justification for the layoff. Rather our task is to determine whether the layoffs were motivated in whole or in part by the employees' union activity or by their exercise of rights conferred upon them by the Act. The Board, with judicial approval, has held that if an employer's actions are motivated, even in part, by anti-union considerations, the employer is in violation of the Act, notwithstanding existing legitimate business reasons (*Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, affirmed by the Divisional Court 80 CLLC 14, 602.)

60. In appropriate cases conduct which is arbitrary, precipitate, unreasonable or extraordinary given the employer's previous practice may lead to an inference of anti-union animus. The Board has long accepted that in a contested unfair labour practice complaint one would not normally expect a respondent to openly or candidly admit that its conduct or actions were in contravention of the Act. For this reason, in cases where layoffs take place in the shadow of the union's organizing campaign the Board carefully scrutinizes the conduct and actions and surrounding circumstances to determine if the "true" or "real" motive, or one of the motives for the layoffs was

tainted by anti-union animus. The Board is required to draw its conclusions about the motivation underlying the respondent's actions and in so doing must necessarily draw inferences from the evidence and must inevitably assess the credibility of the witnesses called by the respondents.

61. The analysis the Board uses in making the determinations it must make has been set out in numerous cases and was succinctly summarized in *Alpha Laboratories Inc.*, [1981] OLRB Rep. July 823 at 824:

"In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

'... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred'.

It is not the function of the Board in the present case to decide whether or not the respondent had just cause to discharge the grievors. Our jurisdiction is limited to determining whether the respondent discharged the grievors because they were supporters of the complainant trade union or were exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent's actions, as indicated by the Board in *Fielding Lumber Company* [1975] OLRB Rep. Sept. 665, at paragraph 19:

'The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* - a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.'

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determinations are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

'In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities'. (See *National Automatic Vending Co. Ltd.* 63 CLLC 16,278).....'

62. In the *Pop Shoppe* case, *supra* the Board went on to state that in assessing the circumstances in order to determine whether the conduct was unlawful the Board "... must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct." (*Pop Shoppe*, *supra* at page 301). Similarly, in the *Barrie Examiner* case, *supra* at paragraph 17 the Board wrote

"... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive for masquerading as just cause."

63. We are satisfied that Classic has violated the Act. Classic has not discharged the burden of proof cast upon it. It is not disputed that the layoffs immediately followed the time when Classic received actual notice of the union's application for certification and in such circumstances it is incumbent upon the employer to satisfactorily explain the timing of the layoffs. Classic has not provided any reasonable or credible explanation for the layoff of these employees.

64. If we are to believe that Mr. Trindade had no involvement with Classic at the times relevant to this complaint and does not speak on behalf of Classic (a matter which will be addressed in further detail below) we simply have no explanation from Classic why the employees were laid off at a time when there was concurrent union activity. If Mr. Trindade's evidence to the effect that he has no knowledge of the operations or affairs of Classic (especially in relation to the Stoney Brook site) is to be accepted and believed, we cannot also accept and believe that portion of his evidence in which he proffered certain reasonable or rational explanations for the layoffs. That would be wholly inconsistent. Mr. Trindade can't say on the one hand he knows nothing about Classic's jobs and operations, and on the other hand say the reasons for the layoffs were a lack of work, seniority, etc. On that basis alone we must find that Classic has violated the Act for then we have no explanation at all from the corporate entity which employed the grievors as to why these employees were laid off.

65. The fact of the matter however is that we do not believe or accept Mr. Trindade's evidence. First, it simply stretches credulity for Mr. Trindade to say on the one hand that the employees laid off were a separate block crew which was laid off because of a lack of work and in any event the employees were the least senior employees, but then to also maintain that he has no knowledge of the affairs or operations of Classic, and has not been involved with Classic since his resignation from the company in October 1991.

66. Secondly, Mr. Trindade's evidence of separate brick and block crews, his professed lack of knowledge as to whether persons were/were not union members, his evidence that he was unaware of any union activity, his evidence that he didn't hire or lay off employees and his position that there was a lack of work was contradicted by the evidence of the union's witnesses. We have already found that the evidence of each of the union's witnesses was more credible and reliable than that of Mr. Trindade.

67. Thirdly, Mr. Trindade's evidence was in and of itself contradicted by the documentary evidence which came from the company pursuant to the summons *duces tecum* served on Mr. Trindade. (We will not attempt to address counsel's submissions which questioned how Mr. Trindade managed to obtain the payroll records of a company with which he asserts he has an arms-length relationship). Thus, for example, Mr. Trindade's evidence that a separate brick crew was brought to the Stoney Brook site when that crew finished its work at Classic's residential sites is contradicted by Classic's payroll records. These records show that in the pay period following the pay period in which the grievors were laid off (pay period ending February 29, 1992) there were ten new employees listed on the payroll. Of these ten only one person (Claude Freitas) had received any pay from Classic for the pay period ending February 22 (the pay period during which the layoffs occurred). Only two of the other nine employees appear on the payroll record in the five week period preceding the layoff (Alberto Ameron's name appears on the payroll records for the period ending January 31, 1992 and Antonio Sousa's name appears on the payroll record for that pay period and the pay period ending January 25, 1992).

68. Moreover, at least three of these ten new persons working for Classic (Cesar Roias, Joe Pacheco and Joao Martins Franco) during the pay period ending February 29, 1992 do not appear on *either* the 1992 payroll records of the company prior to the layoff of the grievors *or* the typewrit-

ten seniority lists which Mr. Trindade tendered during his examination-in-chief. In the face of such documentary evidence coming from the employer's own records it is patently obvious that Mr. Trindade was mistaken when he testified that bricklayers were simply transferred to the Stoney Brook site from Classic's residential sites when those jobs were completed. It is equally obvious that his evidence that the layoffs were based on seniority is also in error.

69. Thus, if we look to Mr. Trindade's evidence to support Classic's assertions (at least in its pleadings) that the layoffs were not in contravention of the Act, we again find that Classic has not discharged its burden of proof. There is no credible or reliable evidence before us to support the layoffs on any reasonable or rationale basis. Put simply we do not accept that the reasons Classic laid off employees were those stated by Mr. Trindade in his opening submissions and his evidence-in-chief.

70. Having rejected Mr. Trindade's evidence concerning the reasons for and the timing of the layoffs the inference which the Board draws from the totality of the evidence is that Classic's layoff of these employees was motivated by anti-union animus and was therefore in contravention of the Act. It was a violation of section 65, 67 and 71 of the Act. Classic's conduct in refusing to continue to employ these grievors was specifically designed to discriminate against the grievors because of their union membership and because they chose to exercise rights under the Act. It's behaviour constitutes the imposition of a pecuniary penalty to compel employees from becoming or continuing to be members of the trade union. Classic's conduct was designed to interfere with the representation of employees by the trade union and also constituted intimidation and coercion within the meaning of section 71.

71. Having heard and carefully considered the evidence of the respondents we are not satisfied that the real and only reasons for the layoff of the grievors were related to business justifications. We are satisfied that the layoffs were motivated, at least in part, by the desire of the respondents to show those laid off (and other employees) that the continuation of their employment was dictated by the respondents and that in this regard support for the union could and would be an adverse factor. The laid off employees were in part being penalized because of a perceived support for or involvement with the trade union.

72. It makes no difference to this determination that some of the employees were advised at the time of their lay-off that they would be returned to work in the future. Neither does it make a difference that the employees were eventually recalled after this complaint had been filed so that their loss of income was only temporary. The uncertainty of their date of recall at the time of lay-off, and their subsequent temporary loss of income did send and was designed to send a powerful message to the employees at Classic that support for the union or the exercise of rights under the Act was not viewed with favour by the employer and would have a serious, direct and unfavourable impact on their continuing job security.

73. Having found that Classic breached the Act we must next ask whether Mr. Trindade did as well. Mr. Trindade is personally named as a respondent in this complaint.

74. The Board has the jurisdiction to find personal liability under the sections of the Act referred to in this complaint. Sections 65 and 67 both refer to "no employer ... [or] *person* acting on behalf of employer ..." and clearly provide the Board with statutory authority to find personal liability. Section 71 specifically refers to "no *person* ... shall seek by intimidation or coercion ...".

75. The issue of personal liability of named respondents has been dealt with in a number of Board decisions. In the *Nepean Roof Truss Limited*, [1988] OLRB Rep. Jan. 61 the Board

addressed the arguments of the respondents that an individual owner or officer of a corporate employer could not be personally liable. There the Board stated:

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25. Having found that Nepean breached the Act, we must next ask whether Ouellette and Steenbakkens did as well. Counsel for the respondents argued that personal liability could not in these circumstances, as a matter of law, be found pursuant to sections 64 and 66 of the Act. Counsel submitted that where those sections refer to “no person acting on behalf of an employer”, they do not constitute authority for the Board to find an individual officer or owner of a corporate employer to be personally liable. Rather, counsel submitted that those sections, and this particular phrase therein, enable the Board to find liability with respect to third parties who act on behalf of an employer. Such potential liability is necessary in order to preclude employers from doing indirectly, through the actions of a third party, what they cannot do directly. Counsel further submitted that the statute is clear where personal liability is meant to be found under a particular section, and looking to those other sections buttresses the submission that personal liability of an owner or officer of an employer was not contemplated by the wording of sections 64 and 66. Counsel referred to section 70, which indicates that “no person ... shall” as an example of a clear indication that individuals can be personally liable for a breach of that section. Counsel also referred to section 98 of the Act, dealing with prosecutions for violations of the Act, as illustrating that the statute is clear where a court (or tribunal) is able to find personal liability. Finally, counsel submitted that it would be unfair to attach personal liability pursuant to sections 64 and 66, for to do so would mean that personal liability would be found in every breach of the sections by a corporate employer. As corporations can only act through the conduct of individuals, finding liability on behalf of the corporate employer would necessarily, in counsel's submission, lead the Board to find liability against the individual officer who engaged in the offensive conduct. Were the Board to find such authority in the wording of section 64 and 66, there would be two findings of a breach of the Act with respect to the same set of circumstances. In addition to routinely and inappropriately piercing the corporate veil, counsel submitted that such double liability would be unfair.

26. As counsel recognized in his submissions, prior decisions of the Board have either found or recognized that personal liability can be found under these sections: for example, *Sunnylea Foods Limited* [1981] OLRB Rep. Nov. 1640, *Heritage Manor Rest Home* [1983] OLRB Rep. March 385, *Daynes Health Care Limited* [1985] OLRB Rep. March 387, *Termarg Food Services Limited* [1985] OLRB Rep. March 516, *Doyles Tavern* [1985] OLRB Rep. May 662, *Forintek Canada Inc.* [1986] OLRB Rep. April 453 and *Peralta Foods* [1987] OLRB Rep. Sept. 1162. We agree with those decisions where they find statutory authority in sections 64 and 66 for the jurisdiction to find personal liability. The clear wording of those sections, particularly where they state “no employer ... or person acting on behalf of an employer ...” gives the Board jurisdiction to find that an individual has breached the section, including an individual other than one working for a party unrelated to the corporate employer. We see nothing in that phrase which suggests that a person “acting on behalf of an employer” cannot be an owner or officer of the corporate employer. We are not prepared to read into that phrase a limitation on finding liability that depends on the identity of the employer of the “person acting on behalf of”, as suggested by counsel for the respondents. To read such a restriction into that section is neither consistent with the language used therein, nor consistent with sound labour relations policy. These sections are designed to protect the ability of unions and individuals to exercise the rights afforded them under the *Labour Relations Act*. To read in the limitation suggested by counsel for the respondents would be to allow individual officers or owners of a corporate respondent to escape personal liability for any wrongdoing committed by them. In circumstances where, for example, the corporate entity is a shell corporation or a corporation without significant assets, individuals could in practice breach these sections with impunity. Given the clear language, it remains open to the Board to find that an individual has breached the Act, where it is so pleaded and is borne out by the facts (having regard to the section claimed to have been breached).

27. As the then chairman of the Board stated in *Sunnylea Foods Limited*, *supra*, at ¶38:

“... I can conceive of a number of situations where it would be appropriate to name

the person responsible for the unfair labour practice where that person is primarily in control of the employing entity or other organization... No matter how mild the remedy, it is one that the complainant should be able to pursue against the ongoing activities of Mr. Zonneveld. Indeed, had the complainant's core allegations been established, a remedy confined to *Sunnylea* may have been quite ineffective. If the potential for personal liability is not understood in the labour relations community, I would hope this decision sheds some light on the matter."

28. And in *Termarg Food Services Limited*, *supra*, at ¶6, the Board noted:

"... in an appropriate kind of case, and at least where the corporate entity itself has disappeared or has explicitly threatened to do so if a full measure of damages is claimed, the Board is not unprepared to fix liability to an individual or "person" acting on behalf of the corporate employer. But again, every corporation must ultimately act through individuals, and the applicant has been unable to plead (nor, as in *Sunnylea* and *Daynes*, has prior litigation shown) a course of conduct anywhere close to the exceptional circumstances causing the Board to consider the steps it did in those latter two cases."

It may not be necessary in a given case for the Board to decide whether an individual has breached the Act. But where the Board does find it necessary to determine that issue, whether or not the Board will find individuals to have breached the Act does not depend on special or exceptional circumstances. It depends only on whether the persons are alleged to have breached a particular section of the Act, and on whether the evidence establishes their breach of that section. The Board of course retains a discretion, notwithstanding the breach, over the appropriate remedy, if any, to be directed against an individual, or against a corporate employer for that matter, and the exercise of this discretion depends on whether the Board considers it appropriate in the circumstances, in the interests of promoting harmonious labour relations within the Province.

...

76. In the *Nepean Roof Truss Limited* the Board ultimately found both the President/General Manager and Vice-President to be personally liable for certain breaches of the Act. These individuals directed, managed and controlled the operations of the corporate entity named as a respondent and were the individuals who were the "controlling and directing minds" behind the conduct which contravened the Act. (See also *Bourque Consumer Electronics Service Inc.*, [1990] OLRB Rep. Oct. 999).

77. Judicial approval for personal liability can also be found in the comments of Mr. Justice Adams whose decision on behalf of the Divisional Court in *Plaza Fibreglass Manufacturing Limited*, [1993] OLRB Rep. January 83 states:

Mrs. Citron's liability was confined to her breaches of section 64 and did not embrace losses flowing from violations of sections 15 and 75. These latter provisions may only be violated by a corporate or employing entity. The OLRB was very careful to limit Mrs. Citron's liability to that aspect of her conduct which violated section 64. While these same actions were the basis for finding that the corporate applicants also breached 64, we are satisfied there were circumstances before the Board to justify it holding Mrs. Citron personally accountable. She was instrumental in the movement of the work outside the ambit of the trade union's bargaining rights. She dealt directly with the employees to facilitate the staffing of the Concord location. She has exhibited a long-standing opposition to her employees exercising their rights under the Act. Having regard to the exceptional circumstances reflected in the substantial history of this matter, we can find no jurisdictional error in the Board's determination that Mrs. Citron was jointly and severally liable for the specified breaches of section 64.

78. In *Securicor Investigation and Security Ltd.*, [1982] OLRB Rep. May 759 the Board addressed the issue of the liability of a third party which acted on behalf of the employer and ultimately

mately attached personal liability for the actions which contravened the Act committed by that third party (see the subsequent decision of the Board in the same case reported at 1983 OLRB Rep. May 720). Although the facts and circumstances of that case are distinct from those before us, the case demonstrates that third parties, who are neither officers, directors nor employees of the employer may be independently liable for conduct which violates the Act. In that case the Board first dealt with the concept of the joint tortfeasor and then stated at page 764:

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19. Securicor is not an employer or employer's organization and, therefore, in order to be within the ambit of either section, Securicor must be a "person acting on behalf of an employer or an employers' organization." If a private security company contracts with an employer party to a labour dispute to provide security services in connection with that dispute for a fee, it is difficult to resist the conclusion that the security company is a person acting on behalf of the employer, subject to the prohibitions contained in sections 64 and 66 of the Act. In these circumstances, it does not lie in the mouth of the security company, in defence of allegations that its conduct in connection with the labour dispute has breached 64 or 66 of the Act, to claim that it exceeded the authority of the employer and, therefore, was not acting on behalf of the employer and cannot be brought within either of these sections. These sections are designed to protect important union and employee rights from employer interference and where a person is acting in a labour dispute under the general authority of the employer that person is brought within the ambit of these sections in respect of all of its action, including those which may be outside of its specific terms of reference. We are not about to interpret the words "acting on behalf of" in such a way as to allow third parties in contractual relations with the employer to provide services in connection with a labour dispute to violate employee and union rights and then rely on carefully worded contracts to take themselves outside the ambit of the Act. ...

20. Does the withdrawal of the complaint against Automotive constitute a withdrawal against Securicor, and, if it does not, should the Board refuse to grant the request to withdraw against Automotive? Failing a natural justice impediment, the answer to the question posed at the outset of this paragraph is no. As we have stated, Securicor, as a separate entity in contractual relations with the employer and charging a fee for its service, is subject to the prohibitions contained in section 64 and 66 of the Act. The statute clearly identifies "a person acting on behalf of an employer" as an independent actor capable of breaching the law, and therefore capable of being a separate respondent in its own right. In so far as the merits are concerned, therefore, Securicor must stand or fall on its own conduct. ...

22. The prohibition against intimidation and coercion contained in section 70 of the Act extends to persons acting on their own behalf. There is no requirement under the section for a person to be acting on behalf of the employer. Section 70 provides:

No person, trade union or employer's organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

If it is proved that the agent's actions, once disclosed, have an ongoing coercive impact in the exercise of employee rights under the Act, including the right to strike, then, arguably at least, the agent has breached the section and is subject to the remedial authority of the Board. In so far as a breach of section 70 is alleged, therefore, the withdrawal of the complaint against Automotive cannot affect the complaint against Securicor.

79. We find the rationale underlying each of these various decisions to be equally applicable to the situation before us. A corporate employer such as Classic should not be able to do indirectly and through the actions of a third party that which it cannot do directly. Conversely third parties, regardless of whether or not they are officers, directors or employees of the corporate employer, should not be able to breach the Act but escape liability for their actions merely because they are

not the employer of the employees directly affected by their improper conduct. Similarly, we concur with the statements of the Board in *Nepean Roof Truss Limited, supra*, to the effect that there must be a practical, meaningful remedy available to complainants where the Act has been breached. In cases where a corporate entity is only a shell corporation or is without significant assets, the only meaningful and practical remedy may be those found against a named personal respondent who has breached the Act. Any other interpretation of the statutory language could thus result in either corporations or persons violating the Act with impunity while the trade union and employees directly affected by the improper conduct are left with an ineffective and meaningless remedy.

80. In the circumstances before us we find that at all relevant times Mr. Trindade was a "person acting on behalf of an employer" and as a consequence he is also personally liable for breaches of the Act. In addition, Mr. Trindade has personally violated section 71 of the Act in that his conduct was designed to intimidate, coerce or compel persons to refrain from union membership and the exercise of rights under the Act.

81. We have determined Mr. Trindade was a "person acting on behalf of an employer" both on the basis of his own *viva voce* testimony and the evidence of the witnesses called by the union. Without detailing again the difficulties inherent with accepting Mr. Trindade's evidence we find that, notwithstanding his assertions to the contrary, Mr. Trindade continued to be directly and intimately involved with the operations at Classic and its day to day activities. He continued to direct its operations including its labour relations notwithstanding his apparent resignation from the company in October 1991. Thus, for example, he admitted in his evidence-in-chief that *he* told the foreman that if there were too many people on the job employees should be laid off and that the employees to be laid off should be the most junior employees. Similarly he admitted that he personally told employees that the layoff was only temporary and they would be called back as soon as Classic had more work. By his own admission he "promised" the Superintendent on site "a couple of times" that he would provide another crew to do the brick work as soon as that crew was finished at another residential job.

82. The evidence of the Classic employees also indicates that even after his apparent resignation Mr. Trindade continued to be directly and intimately involved in the hiring of employees, in setting their wage rates, in directing which employees would get a raise, and in transferring employees from various sites, i.e., from the residential sites or the Cambridge school site to the Stoney Brook site. He was well aware of the union's efforts to enforce the *Government Contracts Hours and Wages Act* and the letters received by Classic with respect to that matter and was concerned about the union's activities in this regard. Mr. Trindade's suggestion that he simply posted papers given to him by his wife and was unaware of union activity prior to that time is not credible.

83. Most importantly on the totality of the evidence we have concluded that Mr. Trindade was also the controlling and directing mind behind both the decision to layoff employees and the actual determination as to which employees were to be laid off. As indicated herein, we have found that decision to have been a contravention of the Act.

Remedy

84. In addition to declaratory relief the trade union seeks compensation on behalf of those employees improperly laid off. The measure of damages it seeks is based on the calculation of the number of work days these employees were laid off multiplied by an hourly rate equal to that required by the *Government Contracts Hours and Wages Act*. According to the trade union the calculation is to be made on a standard 40 hour work week basis. In addition the union seeks an order declaring that Classic pay to Carlos Braga 37 1/2 hours of pay which it asserts is still owing to him

as a result of Classic's failure to pay Mr. Braga the wages owing to him for his last week of work immediately preceding the layoff.

85. With respect to the claim for compensatory damages we find that the union's claim is too broad and not necessarily an accurate reflection of the monetary damages actually suffered by grievors. First, the Board notes that it does not have the jurisdiction to enforce the *Government Contracts Hours and Wages Act*. Therefore any claim for damages must in our view be made on the basis of the actual hourly rate being paid to the employees at the time of their layoff and not on what they "should have" received (we note that the hourly rate of five of the seven laid off employees in fact exceeded the rate referred to by Mr. Haggis in his evidence with respect to the *Government Contracts Hours and Wages Act*). The Board is also not the adjudicative body with jurisdiction over the enforcement of the *Employment Standards Act*. Mr. Braga's claim for unpaid wages can and may be pursued under the provisions of that Act. There is simply no evidence that the non-payment of these wages was the result of conduct which violates the Act.

86. At first, the use of a 40 hour work week to calculate the amount of damages appeared to be excessive. The evidence does not appear to support a finding that this was the standard work week. Indeed the payroll records indicate that employees of Classic and in particular the grievors both before their layoff and after their return to work often worked less than a 40 hour week. In addition these payroll records indicate that any "new" employees on the Classic payroll (i.e. employees who were not on the payroll prior to the grievors' layoff) did not in fact all work 40 hour work weeks while the grievors were on layoff. After the initial week or two following the grievors' layoff several of these new employees did not work at all notwithstanding the continued layoff of the grievors. The payroll records further indicate that the total number of Classic employees did decrease shortly after the layoff of the grievors, suggesting perhaps that at times during the layoff of the grievors there was not sufficient work to keep all persons at the site employed for 40 hours per week.

87. On the other hand the payroll records *also* indicate that there was a significant turnover within the employee complement at Classic during the period of the grievors' layoff. In addition to the ten persons already referred to who suddenly appear on the Classic payroll in the week following the grievors' layoff (although the majority were not on the Classic payroll in the pay periods which preceded that layoff), the Board has identified at least another eleven bricklayers who worked for some period of time while all or some of the grievors were on layoff. The vast majority of these persons worked for the latter one or two weeks of the period of time during which the grievors were on layoff. Alternatively some of these persons were in fact working 40 hours during the pay periods when some of the grievors were first recalled and are shown to have worked significantly less hours. Thus, for example, an employee who *first* appears on the 1992 Classic payroll record for the week ending March 21st (when some of the grievors were first recalled) worked 40 hours while the recalled grievors worked only 13 1/2 hours. Similarly other employees who *first* appear on the 1992 Classic payroll record for the pay period ending March 28th (when more of the grievors were recalled) generally worked 40 hours while the newly recalled grievors worked only eleven or twelve hours, and those grievors who had been recalled in the prior pay period worked 27 1/2 to 32 1/2 hours.

88. Undoubtedly some of these fluctuations in hours and the number of employees is due to the usual factors which face persons engaged in the construction industry including the weather, the progress of the job, the availability of material, etc. Given the nature of the construction industry and the circumstances of this case the calculation of damages is perhaps even less of a precise science than is often the situation.

89. We do not think much purpose can be served by remitting this matter to the parties to see if they can agree on the amount of compensatory damages. The Board has before it the payroll records of Classic for the relevant period of time. On the basis of those records we have concluded that during the period of the grievors' layoff there was, on average, approximately 181 hours of available work which each of the grievors could have performed if they had not been improperly laid off in contravention of the Act. While the grievors were on layoff this work was performed by other persons who had not previously appeared on the 1992 Classic payroll.

90. We have calculated this figure by totalling for the pay periods ending February 29 to March 28 (the period of the layoff) the number of hours worked by persons who did not appear on the 1992 payroll records for Classic prior to the layoff of the grievors. Those hours totalled 1,434. We have subtracted from this total the number of hours worked by the grievors during the same period of time (166.5) to arrive at the figure of 1,267.5 hours of available work. This latter figure was then divided by 7 (the number of grievors) for the average 181 hour determination.

91. Having regard to the hourly wages of the grievors at the time of their lay off (5 earned \$21.00 per hour, one earned \$18.00 per hour while the other earned \$14.00 per hour) we therefore find the appropriate measure of damages for the lost opportunity of the grievors to work because of the breaches of the Act committed by the respondents to be \$24,797.00 $((181 \times 5 \times \$21.00) + (181 \times \$18.00) + (181 \times \$14.00))$. We recognize this figures closely approximates the amount of damages which we would have found owing had we accepted the union's submissions that the grievors were variously entitled to four days plus 3, 4 or 5 weeks of pay depending of their week of recall. In our view, however, the formula used by the Board reflects more closely the actual damages suffered by the grievors. We also find that interest on that amount of damages should be awarded (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220). That interest is to be calculated in accordance with the formula set out by the Board in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35.

92. In the result we make the following orders and declarations:

1. We declare that the respondents Classic Masonry Inc. and Luis Trindade have violated section 65, 67 and 71 of the *Labour Relations Act*.
 2. As a result of those violations of the Act the applicant trade union and the individuals grievors have suffered damages. We therefore order that Classic Masonry Inc. and Luis Trindade forthwith pay to the union on its own behalf and on behalf of its members who grieved the sum \$24,797.00 together with interest thereon. We find Classic Masonry Inc. and Luis Trindade to be jointly and severally liable for these damages.
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1081-93-JD Ironworkers' District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Applicants v. **Comstock Canada**, a division of Lundrigans-Comstock Limited, Millwrights' District Council of Ontario, Millwrights, Local 1244, United Brotherhood of Carpenters and Joiners of America, Millwrights, Local 1592, United Brotherhood of Carpenters and Joiners of America, Responding Parties

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board rejecting Millwrights' union's assertion that jurisdictional dispute ought to be withdrawn or dismissed on basis that there was no longer a 'demand' for work in dispute as a result of a settlement between employer and Ironworkers' union - Board dealing with entire chain of disputed work associated with material handling conveyor systems, including tagging, dismantling or disconnecting, the transporting of the dismantled systems, and their installation or reconnection at the new site - Board satisfied that correct assignment was to composite crew consisting of equal numbers of Ironworkers and Millwrights - Order to be binding upon all other jobs undertaken in the future in Board Area #1 - Board declining Ironworkers' request that orders be binding with respect to Board Areas #2 and #3

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *S.B.D. Wahl* and *G. Michaluk* for Ironworkers, Local 700; *N. L. Jesin* and *H. Martinak* for Millwrights, Local 1244; *P. Fitzgerald* for Millwrights, Local 1592; No-one appearing on behalf of Comstock.

DECISION OF THE BOARD; August 19, 1993

1. This is a jurisdictional complaint, filed in June 1993, pursuant to the recently amended section 93 of the *Labour Relations Act* ("the Act"). The Board held a consultation with the parties, during which it delivered several oral rulings, which we put in written form and expand upon here.
2. This dispute is between the Ironworkers and the Millwrights over certain work in south-western Ontario. Approximately one week prior to the day scheduled for the consultation, the applicants, the Ironworkers, notified the Board and the other parties that the employer, Comstock, and the Ironworkers had settled both the instant application and a related application pursuant to section 126 of the *Act* (Board File No. 1187-93-G). The Ironworkers advised that the Millwrights had not signed the settlement, and that accordingly it was still necessary for the consultation in this application to be held.
3. In response, the Millwrights wrote to the Board, indicating they were not party to the settlement, and asserting that the Minutes of Settlement "were ineffective to the extent that they purport to resolve [the instant] jurisdictional dispute." The Millwrights also asserted that the jurisdictional dispute ought to be withdrawn or dismissed by the Board, on the basis there was no longer a "lis" between the parties. At the consultation, they expanded upon these positions, submitting that there was no longer "demand" for the work in dispute, within the meaning of section 93. After hearing the submissions of the parties on this issue, the Board ruled orally that it would not dismiss the consultation, and that the jurisdictional dispute would proceed before the Board.
4. Prior to the recent amendments, jurisdictional complaints involved extremely lengthy litigation, often of several years duration. Under the new provisions, the Board is no longer

required to hold an inquiry or full hearing, but can conduct a consultation, with no need or requirement to hear *viva voce* evidence. Formerly, when the Board had to consider whether to dismiss a jurisdictional dispute on the basis that the grievance had been settled between one of the unions and the employer, the Board and the parties were faced with extremely high litigation costs, from both delay and financial perspectives, if the proceeding continued. That is simply not true today. Now, by the time the parties appear at a consultation, almost all of their costs will already have been incurred. Since in most cases the consultation will be finished in one day, there are no additional financial costs to the parties in proceeding. And since the Board has been able for the most part to render quick decisions in jurisdictional disputes, any delay aspect is minimal, if it exists at all. Further, there would be no savings in Board time and resources if at the consultation the Board decided not to proceed. The jurisprudence which developed prior to the amendments, to the extent that it deals with the potential costs of proceeding with the application, is therefore of limited relevance today.

5. In the instant case, it was clear that the two trades were still in dispute over the correct assignment of the work. This is so even though the employer which had assigned the work had signed a settlement with the Ironworkers, and the settlement on its face applied to both this application and the section 126 application. An employer was still assigning work to persons in one union rather than in another, and the other union still objected. A jurisdictional dispute is a dispute in essence between unions. This dispute still existed, with respect to the same work in the same geographical area of the province and between the same unions. While the Ironworkers and the employer can settle the section 126 application without Millwrights concurrence, a jurisdictional complaint is a three party dispute (if not more) and it cannot be settled only where two of the parties agree. The Millwrights themselves assert this in their letter. Additionally, all the financial costs had already been incurred by the parties, and the dismissal of the application would not save Board resources. Accordingly, the Board ruled as it did, that the consultation would proceed.

6. There was a dispute over the description of the work in dispute. The complainant described the work as "all construction work in connection with the installation, erection, dismantling, alteration or relocation of material handling systems, inclusive of all types of conveyor systems, machinery, and/or equipment including off-loading, rigging, handling, placement, alignment, levelling, securing and adjusting thereof". To paraphrase this description, the Ironworkers were claiming the work involved with the disconnecting or dismantling of all types of material handling conveyor systems, the transportation or removal of the dismantled systems to a new location, and the erection or installation of the material handling systems at the new location. The Ironworkers asserted that all this work ought to be assigned to a composite crew consisting of equal numbers of members of the Ironworkers and the Millwrights, with all members of the crew performing all work functions interchangeably. Part of the Millwrights' response was the assertion that the disputed work assigned by Comstock did not include any erection or installation, and accordingly installation or erection work did not form part of the "work in dispute" and the Board ought not to make any direction with respect thereto.

7. The Board ruled that the work in dispute was as described in the Ironworkers' materials, which included installation, reconnection, or erection of the material handling systems. In the Board's view, the real dispute between the parties was a dispute over the entire chain of work involving material handling systems, from the time that the systems were tagged and disconnected, through their transportation, and including their installation at a new site. The Ironworkers' Briefs make this clear, both in terms of the description of the work in dispute between the trades, and the different claims in that respect by the two trades. The grievance filed by the Ironworkers against Comstock and the resultant section 126 application both include a claim for the installation work at the new location. The settlement reached between Comstock and the Ironworkers includes agree-

ments as to the correct assignment of the installation work. The Millwrights in their Briefs do not assert any difference between installation and the other operations. From a practical perspective, reflecting the reality of how work is done in the industry, how claims for work are made, and the basis of those claims, the work which remains in dispute is the entire package of work functions, from the disconnecting through to the installation of the systems in question.

8. If the Board were to conclude otherwise, and decide that it could only make a direction with respect to the disconnecting and transportation of the equipment, but not the installation at the new location, then the same parties would have to relitigate the same matter, based upon the same evidence and with the same arguments. This would make little labour relations sense. This work both logically and in practice customarily includes installation.

9. The wording of section 93(2) gives the Board authority to make its decisions binding on parties for other jobs not then in existence, or jobs in other geographic areas. The Legislature has given the Board specific authority to make decisions affecting future jobs, where no work at all has yet been performed. To fulfill this statutory mandate, to fully determine work assignment disputes, the Board must take a realistic view of the work in dispute. The jurisdictional disputes provisions are unlike other parts or sections of the *Labour Relations Act*. For the Board to be able to determine work assignment disputes between trades in a practical fashion, it may in given situations have to look at the overall context. In circumstances where a dispute clearly exists over particular work, where parties have been put on notice of the nature of the competing claims and provided full opportunity to respond, it is more consistent with the Board's mandate to resolve jurisdictional disputes to deal with the real work in dispute.

10. For these reasons, we ruled that our decision ought to deal with the full dispute between the trades, and this included the entire chain of the disputed work, including the tagging, dismantling or disconnecting, the transporting of the dismantled systems, and their installation or reconnection at the new site.

11. With respect the work in dispute, as described in the Ironworkers' materials, the Board accepted the argument of counsel for the Millwrights that the *Acco* decision ([1992] OLRB Rep. May 537) did not decide the issue before it. The Board in that decision dealt only with a monorail conveyor system, and the systems here encompass all types of conveyors, including monorail systems.

12. The Board was not persuaded to draw distinctions between the types of material handling conveyor systems, whether they be monorail, light package, or other types. Nor were we prepared to accept the distinction urged upon us by the Millwrights that we ought to distinguish, for purposes of area and employer practice, between the food and automotive industries, or for that matter any other types of industry. There was not a significant practice in Board Area #1 of assignments in the I.C.I. sector being made on a different basis depending on whether they arose in the automotive or another context. We therefore considered the overall I.C.I. practice. That practice did not establish in Board Area #1 a pattern of assignments of other than a 50-50 composite crew, where the Ironworkers knew of the work and a markup meeting was held. In other words, the prevailing practice where all interested parties were aware of the work was to assign to a composite crew, as claimed here by the Ironworkers.

13. On balance, the Board was satisfied that the correct assignment was as claimed by the Ironworkers. More particularly, we were satisfied that the correct assignment was to a composite crew, consisting of equal numbers of Ironworkers and Millwrights, performing the work functions in question interchangeably. This has been the general (though not invariable) practice in the areas in question. Trade agreements have not been generally followed by the parties in Board Areas #1,

2 or 3. Assignment to a composite crew is the more rational and sensible assignment in all the circumstances.

14. Accordingly, the Board granted the relief sought in paragraph 1 of Tab 1 of the Ironworkers' Brief. To recite it here, we order that:

all construction work in connection with installation, erection, dismantling, alteration or relocation of material handling systems inclusive of all types of conveyor systems, machinery and/or equipment including the off-loading, rigging, handling, placement, alignment, levelling, securing and adjusting thereof at the Campbell Soup Company Limited, Chatham, Ontario should be assigned to a crew consisting of equal numbers of members of Ironworkers, Local 700 and Millwrights Local 1244, performing all work functions interchangeably.

15. Our order will be binding upon all the parties before us, including the employer, Comstock Canada, the Millwrights District Council of Ontario, Millwrights Locals 1244 and 1592, all applicants, and in addition, upon the two employer organizations which were named in the application as parties which might be affected by the application, and to which notice of the proceedings was provided, namely the Ontario Erectors Association, Incorporated and the Association of Millwright Contractors of Ontario. Further, pursuant to section 93(2) of the Act, our order is to be binding as well upon all other jobs undertaken in the future in Board Area #1. The orders in this paragraph apply to assignments where the contractor is bound to both the Ironworkers' Provincial Agreement and the Millwrights' Provincial Agreement.

16. We wish to emphasize and make clear that our order is not intended to affect in any way any pre-existing claims for the work in question by other trades, but is only to determine the correct assignment as between the two trades before us.

17. We made our direction effective with respect to all future jobs in Board Area #1 for several reasons. This has been a festering and continuing dispute between the trades, and has reappeared, under different guises, several times before the Board. The parties are obviously still unable to resolve amongst themselves this dispute, and it is essentially the same dispute occurring over and over again. In its materials, the Ironworkers raised this aspect of the dispute and asserted that it was an abuse of Board proceedings for the Millwrights to continue to challenge the correctness of an assignment based upon a composite crew. The Ironworkers specifically claimed the relief we have given.

18. In *Inplant Contractors Incorporated* (Board File 2827-90-JD), the Board had to decide whether or not to terminate a jurisdictional dispute between the same two parties over similar work, because the grievance had been settled. That case arose prior to the amendments to the Act. The Board wrote as follows:

Practically speaking, this dispute ought not to come before the Board again, given the proceedings and the decision in *Acco*, and given the material disclosed in the Briefs before us. We would have thought that the decision in *Acco* would resolve this dispute in Board Area #1. More particularly, the Millwrights ought to think seriously and at some length before bringing another jurisdictional dispute, or fostering one, of the nature of the one before us, where their request is for other than a fifty-fifty composite crew in Board Area #1, of the sort directed by the Board in *Acco*.

19. The significance of the *Inplant* decision lies not in the fact that another similar dispute, the instant proceeding, has come before the Board, but in the fact that it demonstrates that the dispute in Board Area #1 has existed for some time and continues to exist. Where the materials filed disclose such a continuing dispute, and the materials enable the Board to determine the correct

assignment, the Board may issue remedies that will settle the dispute beyond the particular work assignment.

20. Ironworkers' also requested that the orders be binding with respect to Board Areas #2 and 3. We declined to so order. The geographical locus of the dispute in the prior Board proceedings and in this proceeding was in Board Area #1. The persuasive or practical effect of our decision on assignments in Board Areas #2 and 3 can be addressed in any further proceeding that raises such issues.

1119-93-M United Food and Commercial Workers Union, Local 175/633, Applicant v. 988421 Ontario Inc. c.o.b. as **East Side Mario's**, Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Whether declarations filed by the parties deficient - Board noting that where the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration - Whether to reinstate union organizers accused by employer of theft pending final disposition of unfair labour practice complaint - Potential labour relations harm sought to be avoided by union significantly greater than potential harm to employer of temporary reinstatement - Interim reinstatement ordered

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Kobryn*.

APPEARANCES: *W. Dubinsky*, *Eric Desbiens* and *Michael J. Duden* for the applicant; *Eija Peltokangas* for the responding party.

DECISION OF THE BOARD; August 19, 1993

1. This is an application for an interim order filed pursuant to section 92.1 of the *Labour Relations Act*. The applicant's request relates to a section 91 complaint in Board File 1120-93-U (hereinafter referred to as the "main application") in which the applicant union alleges that the discharges of Albert Francoeur and Eric Desbiens (the "grievors") were in violation of the Act. By decision dated July 5, 1993 [now reported at [1993] OLRB Rep. July 587] the Board ruled as follows:

1. The Board hereby directs that 988421 Ontario Inc. c.o.b. as East Side Mario's forthwith reinstate Eric Desbiens and Albert Francoeur, on an interim basis, pending the final disposition of their unfair labour practice discharge complaint Board File 1120-93-U. We do not think that it is appropriate and we decline to grant any order regarding compensation to the grievors.

2. The Board further directs 988421 Ontario Inc. c.o.b. as East Side Mario's to post the notice attached as Appendix "A" in prominent places in the workplace, where it is most likely to be seen by employees interested in these proceedings.

3. Reasons for this decision and direction will follow in a subsequent decision.

2. These are the reasons for that decision.

3. Both parties filed materials, including signed declarations, as required by Rules 86 and

89 of the Board's Rules of Procedure. Some issues were raised as to the adequacy and sufficiency of these materials. The employer argued that we ought not to rely on the declarations of the grievors since neither declaration includes the statement "This declaration has been prepared by me or under my instruction and I hereby confirm its accuracy" as required by Rule 86. The grievors' declarations include the preamble "I make this declaration further to the Complaint filed by the Applicant against the Responding Party relating to my termination from employment on the 8th day of June, 1993" and are each executed by the appropriate grievor. The union argued that this deficiency was highly technical and, if necessary, it asked the Board to relieve against the strict application of the Rules in this regard. The employer has not indicated what prejudice, if any, flows from what it asserts is the union's non-compliance with the Rules. While we are not in any event attracted to the highly technical position advanced by the employer (indeed, such an approach might have led us not to consider any of the employer's materials in view of its apparent non-compliance with Rule 9), we are satisfied that the union has substantially complied with the requirements of Rule 86. Alternatively, in the circumstances of this case we would be prepared to relieve against the strict application of the Rules.

4. The employer also pointed to some portions of the declarations filed claiming these were clearly not within the first hand knowledge of the declarants. There is no question that a party which files declarations which include information not within the first hand knowledge of the declarant does so at its peril. Indeed, in *Loeb Highland*, [1993] OLRB Rep. Mar. 197 the Board, to the extent it was necessary to rely on the declarations filed, used only those facts that were either first-hand, or not in dispute between the parties. The inclusion of some hearsay along with first hand knowledge in a declaration will, however, not render the entire document void of any utility for the Board's purposes. Where, however, the only support for a critical aspect of a party's case is a hearsay portion of a declaration, the Board may attach little or no weight to that portion of the declaration. In this regard, we note that the company acknowledged that we ought to apply an equally rigorous standard with respect to hearsay portions of its materials as the employer sought to apply to those filed by the union. Related to this issue we note that the employer ultimately conceded that, subject to its concern regarding the hearsay nature of some of the information involved, there was nothing inappropriate in a declarant referring to and incorporating portions of a party's pleadings into his declaration without explicitly repeating them. Similarly, while none of the declarations (with an exception noted below) explicitly detail the harm that might result from granting or not granting the order sought, both parties were able to make argument and submissions regarding that harm based on the materials they had filed.

5. Briefly summarized, the union's materials allege that the grievors met with a union representative on May 27, 1993 to discuss unionization. They received union materials, membership application cards and instructions regarding solicitation of members. On the same and following days the grievors became key organizers in the union's organizing campaign and actively solicited fellow employees to become members of the union. This solicitation took place both at and away from the workplace. The union alleged certain other facts, which we find unnecessary to outline or rely on here, leading to the conclusion that the employer was aware of the grievors' union activity prior to their discharges. Both grievors were discharged by letters dated June 8, 1993. The termination letters provide no reasons for the discharge, advise that the grievors are receiving one week's pay in lieu of notice, and notify the grievors that they are barred from entering the employer's premises. Mr. Francoeur was also given a copy of an authorization the employer provided to the Thunder Bay Chief of Police under the *Trespass to Property Act* regarding Mr. Francoeur. The applicant alleges that since the discharges its organizing campaign has come to a virtual halt and that employees have become afraid to even discuss union matters let alone sign membership cards. The union's materials also detail some of the personal and financial harm the grievors claim they

and their family members have and are continuing to suffer as a result of the discharges. We have not found it necessary to rely on this latter aspect of alleged harm.

6. The employer asserts that the grievors were discharged because they were believed to be stealing from their employer. In addition Mr. Desbiens was further dismissed for threatening a fellow employee with physical harm. The company acknowledges that it was aware of union organizing activity but denies any knowledge of the grievors' involvement therein until after the discharges. Reliance is placed on the declarations executed by four different individuals filed in support of the responding party in this matter.

7. The Board was referred to a number of its recent decisions dealing with the power to grant interim orders under section 92.1 of the Act (see *Loeb Highland*, cited above (and the concurring opinion of Board Member Ronson reported at [1993] OLRB Rep. Apr. 354); *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. Mar. 242; and *Morrison Meat Packers Limited*, [1993] OLRB Rep. Apr. 358). These cases make it clear that the Board will perform two key assessments in determining whether or not to grant an interim order. First, the Board will make an assessment of the apparent merits of an applicant's case in the main application. This assessment, however, of necessity must be made within certain limited parameters and will rarely, if ever, include any determination as to whether or not the Act has been violated (a determination which will be reserved for the panel dealing with and hearing all of the evidence in the relevant main application). As the Board observed in the *Loeb* case, cited above, at paragraph 22 and following:

This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.

... With this in mind, we find it most appropriate to set out as one requirement in a test for interim relief that the main application must reflect an arguable case. By this we mean that if the applicant's assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act.

8. Similar considerations were outlined by the Board in the *Morrison* case, cited above, at paragraph 16:

... it is hardly surprising that there are significant differences in the conduct of these types of proceedings. The most obvious difference is that oral hearings need not be held in these cases. Further, given the premium attached to expedition, even in cases where a hearing is held the Board is unlikely to entertain viva voce evidence. And while the parties are required to file declarations detailing all of the facts relied upon and signed by persons with first hand knowledge, the rules contemplate no opportunity for cross-examination of the declarants. These procedures are consistent with the need for expedition and the fact that no final determinations are made in these types of proceedings. In this context the Board is obviously unlikely to arrive at any firm conclusions regarding the merits of the main application - at best it can only draw some conclusion about the apparent nature of that application. Thus, it appears to us that the most appropriate fashion for the Board to evaluate the apparent merits of the main application should resemble that in which the Board makes determinations under (both the former section 71(1) and the current) Rule 24 of the Board's Rules of Procedure which reads, in part:

Where the Board considers that an application does not make out a case for the

orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing...

In other words unless the Board is satisfied that, assuming the truth of all the facts relied upon by the applicant, an arguable case for the orders or remedies sought in the main application is made out, the applicant's request for an interim order will not be granted.

9. It is clear that this assessment of the apparent merits of the main application is made on the basis of the *applicant's* materials and assuming that all of the facts alleged by the applicant are both true and provable. There is no doubt in our mind that, on this basis, the applicant has established an arguable case for the remedies sought in the main application. Indeed, we are satisfied that we would arrive at the same conclusion even if we were to ignore the applicant's materials insofar as they allege actual knowledge by the employer of the grievors' union activities prior to the discharges (allegations which are explicitly denied in the company's materials). It is difficult to imagine circumstances in which the discharge of key inside union organizers during the early stages of an organizing campaign would not give rise to an arguable violation of the Act. This is not to suggest that every such complaint, or, indeed, the instant one, will succeed on the merits. That, however, is not the determination to be made in the context of an application for an interim order. We are satisfied that the union's application makes out an arguable case for the remedies sought in the main application.

10. The second assessment the Board performs involves a relative evaluation of the harm which may result from granting or not granting the interim order being sought.

11. The present case involves the discharges of union organizers. The potential harm flowing from such conduct has been recognized by this Board long before the advent of interim relief under section 92.1 and was considered at length in the *Loeb* case at paragraph 36 and following:

36. Moving on to the specific balance of harm in this case, the Board has frequently recorded the chilling effects of a discharge of a union organizer on an organizing campaign. For example, in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, the Board said as follows:

However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected, with back-pay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist of those occasions where he will not.

37. Moreover, the Board has found on quite a number of occasions that the discharge of a union organizer during a union campaign may lead to a situation where the true wishes of employees can no longer be ascertained, despite the Board's ability to reinstate the organizer. In other words, the intimidatory effect is so powerful that employees can no longer express their real views on unionization, with the result that certification is granted without a test of employee wishes. For example, in *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356, the Board said in this regard:

A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade

union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote.

38. Similarly, in *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443, the Board was faced with a situation where a company had laid off a number of employees during an organizing campaign in violation of the *Labour Relations Act*. In this case, however, the company recalled the employees shortly thereafter and issued a letter indicating that employees were free to choose union representation or not. The Board found that the damage had already been done, despite the recall and letter, and that employees were no longer able to express their true wishes with respect to union representation. The Board came to a similar conclusion in *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564, despite the reinstatement of an employee laid off in violation of the Act, although there were other factors which resulted in that finding as well.

39. Why is the impact so severe when a union organizer is discharged? The Board has previously commented on the peculiar vulnerability of employees who depend on the employer for their livelihood. In *Pigott Motors (1961) Ltd.* (1962), 63 CLLC ¶16,264, the Board said:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

In *Retake Vinyl Co.*, [1990] OLRB Rep. June 727, the Board commented on this problem in another context:

In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an employee contemplating collective bargaining, a regime frequently not welcomed by employers.

For similar reasons a discharge has been referred to in arbitral jurisprudence as the "capital punishment" of labour relations.

40. The combination of the economic vulnerability of employees and their assumption that an employer does not welcome a union means that a union organizing drive is a relatively fragile enterprise in which momentum is often critical. Where a campaign is disrupted by an unlawful discharge, the Board's jurisprudence under section 9.2 of the Act reflects the fact that such momentum cannot easily be restored by the reinstatement of an employee at some point farther down the road.

12. The potential labour relations harm flowing from the discharge of a union organizer was also highlighted in the concurring reasons of Board Member Ronson who observed at paragraph 2 in the *Loeb* case:

It is also clear to me that the Legislature felt that the effect of the termination of an organizer during a union campaign was so severe that, in most situations, the Board should exercise its discretion to reinstate the organizer pending a hearing to determine if the employer's motive was tainted by anti-union animus.

13. The harm the employer seeks to avoid in resisting the interim order sought is that it will be required, if the order is granted, to have employees on the premises whom it suspects have participated in theft and/or have threatened fellow employees. In the *Loeb* case the grievor's admitted (although indirect) participation in theft was insufficient to cause the Board to conclude that the potential harm of reinstatement outweighed the potential harm of not granting the order sought. In our case, there is, of course, no admission of wrongdoing on the part of either grievor. Further, while it would be inappropriate for us to make any factual findings in the face of disputed facts, we do find it helpful to briefly analyze exactly what conclusions are possible assuming the truth of all the materials filed by the employer. The only support for any conclusion regarding the grievor Desbien's participation in any theft comes from inconsistent, if not conflicting, portions of the declarations of Ray Rose and Rick Fahey. Those relevant portions can be charitably described as multiple hearsay. The only support for any conclusion that the grievor Francoeur participated in any theft can best be described as circumstantial. Furthermore, apart from the assertion that a theft took place on May 18, 1993 there is nothing in the company materials to indicate what, if anything, is alleged to have been stolen. Furthermore, Mr. Rose's declaration specifically acknowledges that there was insufficient evidence to prosecute Mr. Francoeur for theft. Finally, the only support for the allegation that the grievor Desbiens threatened an employee comes from multiple hearsay in the declaration of Mr. Fahey attributing statements to a person identified only as Phil and from the declaration of Mr. Rogers who alleges that Mr. Desbiens said "somebodies legs would have to be broken" if "he" (it is not clear whether the reference is to Mr. Desbiens or Mr. Francoeur) was suspended or fired. Mr. Rogers took these comments as referring to him. We emphasize, again, that we are not making any findings of fact on disputed evidence and, indeed, it may well be that the full picture of all of the evidence (including cross-examination) which emerges in the main application may be significantly different from that indicated by the parties' materials here.

14. We note as well that, at the time this panel granted the interim order sought herein, hearing in the main application was scheduled to commence on July 15, 1993, and to continue from day to day (Monday to Thursday) until completion. Thus, the 10 days that would have elapsed from the date of the hearing in the instant matter to the commencement of the hearing in the main application was significantly less than the period the employer allowed to elapse between its discovery of the alleged theft on May 18 and its subsequent discharge of the grievors on June 8, 1993.

15. Having considered the factors just outlined the Board was satisfied that the potential labour relations harm the union sought to avoid was significantly greater than the potential harm of temporarily reinstating the grievors to employment pending the disposition of the main application. We also concluded that it would be appropriate to leave issues of compensation to be determined in that application. It was for these reasons that the order reproduced above was made.

1426-93-R United Steelworkers of America, Applicant v. Gallup Canada, Inc., Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Practice and Procedure - Employer failing to file timely reply in accordance with Rules of Procedure - Board not permitting employer at hearing to place in issue whether analysts should be excluded from the bargaining unit - Certificate issuing

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *P. Turtle*, *Brando Paris* and *Elizabeth Traichus* for the applicant; *Martin K. Denyes*, *David Hoepfner*, *Maureen Hanrahan* and *John Wood* for the responding party; *M. Honeth* and *Barb Brubacher* for the objectors.

DECISION OF THE BOARD; August 23, 1993

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. After hearing and recessing to consider the submissions of the parties at the hearing of this matter on August 23, 1993, the Board made the following unanimous oral ruling:

Having duly considered the submissions of the parties, we have reached the following unanimous conclusions. We are troubled by the responding party's failure to file a timely reply in accordance with the Board's Rules of Procedure. We are also troubled by the Union's failure to attend the Board Officer's meeting. Assuming without deciding that the difficulties described in subparagraphs (a), (b), and (c) on pages 2 and 3 of Mr. Denyes' letter dated August 20, 1993, are true and provable, they at most provide an explanation for the responding party's failure to file a full list of employees by the terminal date. They do not provide an explanation for that party's failure to file at least a partial reply by that date or to otherwise specifically raise by that date its contention that analysts should be excluded from the bargaining unit. Having regard to all of the circumstances, we are not prepared to permit that matter to be placed in issue in these proceedings as it was not raised in a timely manner by the responding party or the objecting employees, and it would be prejudicial to the Union to permit it to be belatedly raised for adjudication in these proceedings.

Thus, the Board, in the exercise of its discretion under section 6 of the *Labour Relations Act*, finds that all employees of Gallup Canada, Inc. in [the Municipality of] Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, and sales staff, constitute a unit of employees of the responding party appropriate for collective bargaining.

Having further regard to all of the circumstances, we find it unnecessary to determine whether #2 and #7 on Schedule A are included in or excluded from the bargaining unit, as the Union has filed in a timely manner applications for membership in respect of more than fifty-five per cent of the employees in the bargaining unit on the certification application date,

regardless of whether those two persons are employees or persons excluded from the Act under section 1(3). If in the course of bargaining for a collective agreement the issue of whether those persons are or are not employees arises, it may be resolved by means of an application under section 108(2) of the *Labour Relations Act*.

A certificate will issue to the applicant.

4. As indicated in that oral ruling, the Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on July 28, 1993, the certification application date, had applied to become members of the applicant on or before that date.

5. As further indicated in that oral ruling, a certificate will issue to the applicant for the following bargaining unit:

all employees of Gallup Canada, Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and sales staff.

1091-93-R United Steelworkers of America, Applicant v. Hawk Security Systems Ltd., Responding Part v. Wackenhut of Canada Limited, Intervenor

Adjournment - Build-Up - Certification - Parties - Representation Vote - Sale of a Business - Security Guards - Union making certification application in June 1993 in respect of employees of H - H's contract to provide security services not renewed and W providing those service effective July 1993 - W a successor employer within meaning of section 64.2 of the Act - Board permitting W to participate in certification proceeding over union's objection - Board declining to adjourn proceeding to allow union to investigate alleged 'freeze' violation by W - Number of positions in bargaining unit increasing from 11 on certification application date to 13 on date of hearing - Board ruling that 'build-up' principle not applicable in this case - W and H asking Board to direct representation vote on basis of change in composition of bargaining unit since application date - Employees at work on application date sufficiently representative of work force on hearing date that Board finding it appropriate to determine application based on assessment of wishes of those employees without representation vote - Interim certificate issuing

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: Paula Turtle, Mike Piche and Syed Ali for the applicant; M. Catherine Osborne for the responding party; Brian P. Smeenk and Jack Houle for the intervenor.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; August 5, 1993

1. This application for certification came on for hearing on July 26, 1993.
2. The applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*. As a preliminary matter, the applicant objected to the intervention by Wackenhut of

Canada Limited ("Wakenhut") and submitted that Wakenhut should not be permitted to participate in the proceeding.

3. Upon the hearing of the representations of the parties, the Board unanimously ruled, orally, that both the *Labour Relations Act* and rules of natural justice contemplate that a party in the circumstances of Wakenhut herein is entitled to participate in a certification proceeding if it chooses to do so.

4. This application was filed on June 25, 1993. While Hawk Security Systems Ltd. ("Hawk") still employed the employees who are the subject of this application at that time, it had already been announced that Hawk's contract to provide security services to Allied Systems was not being renewed, and that Wakenhut would be providing those security services effective July 16, 1993. This did in fact occur.

5. Sections 64(2.1), 64(3), 64.2(1), 64.2(3) and 64.2(4) of the *Labour Relations Act* provide that

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

1. A proceeding before the Board under any Act.
2. A proceeding before another person or body under this Act or the *Hospital Labour Disputes Arbitration Act*.
3. A proceeding before the Board or another person or body relating to the collective agreement.

• • •

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

• • •

64.2-(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

• • •

(3) For the purposes of section 64, the sale of a business is deemed to have occurred,

- (a) if employees perform services at premises that are their principal place of work;
- (b) if their employer ceases, in whole or in part, to provide the services at those premises; and
- (c) if substantially similar services are subsequently provided at the premises under the direction of another employer.

(4) For the purposes of section 64, the employer referred to in clause (3)(b) is considered to be

the predecessor employer and the employer referred to in clause (3)(c) is considered to be the successor employer.

6. The applicant did not dispute Wakenhut's assertion that it is a successor employer within the meaning of section 64.2 of the Act. Accordingly, pursuant to section 64(2.1), Wakenhut is a party unless the Board otherwise declares. The Board's discretion in that respect should be exercised only if there is a good reason to exclude a successor employer in the position of Wakenhut from the proceeding.

7. In this case, it was conceded that Wakenhut stands in the shoes of Hawk for labour relations purposes, and that if this application was successful Wakenhut would be the employer with respect to which the applicant would have bargaining rights. As such, Wakenhut has a direct and substantial interest in these proceedings. Further, the Board was unable to discern any reason why Wakenhut should not be allowed to participate. The Board therefor ruled as aforesaid; that is, that Wakenhut was entitled to participate in this proceeding.

8. The Board then asked the parties to address the "build-up" issue raised by Hawk and Wakenhut. Hawk and Wakenhut took the position that the Board should not dispose of this application without testing the wishes of the current employees of Wakenhut through a representation vote. Hawk and Wakenhut submitted that the employees of Hawk on the certification application date herein were not representative of the work force employed at the same locations by Wakenhut since July 16, 1993. Hawk and Wakenhut submitted that the wishes of the Hawk employees with respect to this application were not necessarily the same as the wishes of the Wakenhut employees, that the latter group is the one actually effected by this application, and that the Board should therefor exercise its discretion under section 8 of the *Labour Relations Act* to order a representation vote of the Wakenhut employees in that respect.

9. All parties agreed that Hawk had employed 11 persons (9 security guards and 2 others who the two employers assert are "clerical" employees and should not be included in the bargaining unit - see below) at the location to which this application pertains. Wakenhut now employs 13 persons at those same locations, 7 of whom were security guards previously employed there by Hawk.

10. Although the applicant did not dispute these facts, counsel said she had information that Wakenhut had not acted properly in offering employment to the incumbent Hawk employees pursuant to the *Employment Standards Act*, and that Wakenhut had employed the incumbent Hawk employees who accepted its offer of employment on different terms and conditions in breach of the "freeze" provisions (section 81) of the *Labour Relations Act*. The applicant requested an adjournment to permit it to investigate the situation further and to make the appropriate application to the Board if necessary, and also sought to reserve the right to a quickly scheduled hearing in that respect. Hawk and Wakenhut both opposed the adjournment.

11. It has long been accepted that the effect of delay in labour relations matter is generally a negative one; that is, that labour relations delayed are labour relations defeated and denied (*Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild, Local 205, OLRB et al.*, [1977] 1 ACWS 817 (Ontario Court of Appeal)), and that delay in labour relations matters often works unfairness and hardship (*Re United Headware and Builmore - Stetson (Canada) Inc.*, (1983) 40 O.R. (2d) 287). Delay in the disposition of any labour relations matter is likely to result in some prejudice. This is particularly true in representation proceedings. Consequently, the Board and the Courts have long recognized that it is both in the public interest and in the interests of those directly involved to deal with labour relations matters expeditiously. The recent amendments to

the *Labour Relations Act* and the changes in the Board's procedures underline both the Legislature's and the Board's sensitivity to the need to deal with labour relations matters quickly.

12. Subject to the rules of natural justice and fairness, the Board enjoys a broad discretion to determine whether and in what circumstances proceedings before it should be adjourned (*Re Flamboro Downs Holdings Ltd. and Teamsters Local 1879*, (1979) 24 O.R. (2d) 400 (Ontario Div. Court)). In recognition of the need to proceed with labour relations matters expeditiously, the Board's well established practice is not to grant an adjournments except on consent of all parties, or where the Board is satisfied that there are extenuating circumstances such that an adjournment is appropriate. No party is entitled to an adjournment as a matter of right or convenience.

13. In this case, the parties opposite would not consent to the applicant's request for an adjournment. Nor, in the Board's unanimous view, was an adjournment appropriate in the circumstances.

14. By letter dated July 2, 1993, addressed to both Hawk and Wakenhut, the applicant indicated that it understood that Wakenhut was going to take over the contract for security services from Hawk as aforesaid, and took the position that Wakenhut is a successor employer to Hawk. The applicant also alleged that Wakenhut had offered employment to the incumbent Hawk employees on terms and conditions which were in breach of the provisions of the *Labour Relations Act* and the *Employment Standards Act*, and, further, that the applicant did not consent thereto. That is, as early as July 2, 1993, the applicant had sufficient "information" to prompt it to raise the very allegations it made in the same general way at the July 26, 1993 hearing, but had apparently made little or no further inquiry or investigation in that respect prior to the hearing. The applicant offered no explanation for its failure to pursue the matter prior to the July 26, 1993 hearing.

15. It was apparent that the applicant could have and should have conducted the investigation it sought the adjournment to permit it to perform prior to the July 26, 1993 hearing. The Board was not satisfied that an adjournment was appropriate in the circumstances and denied the applicant's request for one in an oral ruling.

16. The applicant then submitted that the Board should not determine the "build-up" issue on the basis of the facts then before it because of the information the applicant had that some of the former Hawk employees would now be Wakenhut employees but for Wakenhut's improper conduct, and that this could impact on the Board's considerations.

17. The applicant did not dispute the facts asserted. Nor could it specify any other material facts or "information". Again, the applicant had been aware of the "build-up" issue for several weeks prior to the July 26, 1993 hearing, and, as we have already indicated, had concerns regarding Wakenhut's hiring of Hawk employees since at least July 2, 1993. The applicant had had ample opportunity to investigate and prepare to deal with the "build-up" issue. The Board therefor found it appropriate to deal with the issue on the basis of the undisputed facts and so ruled unanimously, again orally.

18. Upon considering the representations of Hawk and Wakenhut in that respect, the Board determined that this was not an appropriate case to apply the "build-up" principle developed in the Board's jurisprudence and that it was appropriate to determine the applicant's right to certification on the basis of an assessment of the wishes of the employees in the bargaining unit on the certification application date. Notwithstanding the concurring opinion of Board Member Wightman, the Board held in a unanimous oral ruling, that this was not an appropriate case to order a representation vote pursuant to the Board's discretion under section 8 of the *Labour Relations Act*, and dismissed the request by Hawk and Wakenhut in that respect.

19. The Board may defer consideration of a non-construction application for certification, or order a representation vote in such an application, where it appears that the employees in the bargaining unit at the time the application was made are not a substantial and representative part of the work force which is expected to be employed within a reasonable time. In doing so, the Board seeks to balance the right of current employees to seek to bargain collectively with the right of predictable (in number) future employees to exercise that same choice. As the Board explained in *GSW Inc.*, [1990] OLRB Rep. May 535, at paragraphs 2 and 3:

2. When the Board grants certification without a vote under section 7, the representation question is determined by the wishes of those employed in the subject bargaining unit on the application date. When the Board directs that a representation vote be conducted, the outcome is determined by the wishes of those employed in the unit on a later date or dates determined by the Board. Over the years, the Board has said it will exercise its discretion under subsection 7(2) of the Act in favour of directing a representation vote so as to enfranchise subsequently hired employees when it is persuaded that, as of the application date, the employer had a firm plan for an imminent "build-up" of the work force in the bargaining unit to such an extent that those employed in the unit on the application date are not truly representative of those expected to be employed in that unit in the long term. In that event, the Board will also defer both the conduct of the vote and the date as of which voter eligibility is determined until a representative number are so employed.

3. Before it will direct a deferred vote by reason of planned "build-up", the Board must be persuaded that the plan is "firm", in that its actualization is not dependent on factors beyond the control of the employer, and that the planned build-up will take place within a reasonable period of time. It must also be persuaded that the existing group is insufficiently representative of the expected total. That normally turns on whether the employees employed at the time of the application constitute less than fifty per cent of the level employment will reach as a result of the build-up. In assessing "build-up" situations, the Board generally does not take into account normal fluctuations in the respondent's work force arising out of the cyclical or seasonal nature of the particular business in which it is engaged; (see generally *F. Lepper & Ltd.*, [1977] OLRB Rep. Dec. 846; *United Parcel Service Canada Ltd.*, [1978] OLRB Rep. Feb. 172; *Gabriel of Canada Limited*, [1981] OLRB Rep. July 876; and *Marley Roof Tiles Limited*, [1984] OLRB Rep. Mar. 511). For a build up to warrant a deferred vote, then, the number of employees who will be added to the unit during the "build-up" must normally exceed the number employed on the date the application is made.

(See also, *Champlain Force Products Ltd.*, [1972] OLRB Rep. May 399; *Inco*, [1973] OLRB Rep. March 172; *Valdi Inc.*, [1979] OLRB Rep. June 588; *Domco Foodservices Limited* [1980] OLRB Rep. Jan. 33; *Atlantic Packaging Products Ltd.*, [1980] OLRB Rep. Feb. 158; *Queen's University of Kingston*, [1982] OLRB Rep. May 753; *University of Windsor*, [1983] OLRB Rep. Mar. 478).

20. In this case, the so called "build-up" had already occurred by the date of hearing. The number of positions had indeed increased since the certification application date, but only by 2, from 11 to 13. This is far from the kind of increase which would cause the Board to exercise its discretion to order a representation vote as requested by Hawk and Wakenhut. The Board was not satisfied that the "build-up" principle was applicable in this case.

21. The real basis for the request for a representation vote was the change in the composition of the bargaining unit rather than the number of employees in it; that is, that "only" 7 of the 13 employees now in the bargaining unit were in it on the certification application date.

22. A change in a composition of a bargaining unit is not normally something which the Board takes into account in a certification application. In an application for certification, both the parties and the Board must be able to ascertain the number and identity of the employees in the bargaining unit which is the subject of the application. In that respect, it has long been the Board's practice in other than "build-up" situations not to take into account changes in the number or

identity of employees after the certification application date (see, for example, *Beller Steel Co. Ltd.*, [1968] OLRB Rep. July 377; *Nordic Air Hauls of Canada Ltd.*, [1970] OLRB Rep. Jan. 1257). In dealing with an application for certification which does not relate to the construction industry, the Board considers the wishes of employees at work in the bargaining unit on the certification application date, and of employees who though not at work on the application date worked in the unit at any time during the 30 day period immediately preceding the certification application date *and* worked or are expected to work in the unit at any time during the 30 day period immediately following the certification application date. This “30-30” rule serves as a bright line test for determining the employees who are both present during the trade union’s organizing campaign and continue to have a connection with the workplace. Like all other practices or policies of the Board, this practice operates as a general guideline rather than as a rule which is written in stone. However, this particular practice has so proved its worth over the years that there is now a relatively heavy onus on a party which wants the Board to depart from it to satisfy the Board that it is appropriate to do so (as, for example, in a “build-up” situations). That is so now more than ever, given the even greater emphasis on the certification application date since the Act was amended effective January 1, 1993. In this case, 6 of the employees employed in the bargaining unit by Wakenhut were not employed in it by Hawk. Seven of the employees employed in the bargaining unit by Wakenhut were employed in it by Hawk. In other words, there were more employees who continue to be in the bargaining unit than there were new employees in it. The Board has always considered this to be sufficiently representative for certification purposes, even in build-up situations (see *GSW Inc.*, *supra*).

23. The Board was satisfied that the employees at work in the bargaining unit on the certification application date were sufficiently representative of the work force on the date of the hearing that it was appropriate to determine the application on the basis of an assessment of the wishes of those employees without a representation vote, and that there was no other cogent reason to conduct a representation vote as requested by Hawk and Wakenhut. The Board therefor dismissed the request for a representation vote as aforesaid.

24. There was partial agreement between the parties with respect to the description of the bargaining unit herein as follows:

all employees of Hawk Security Systems Ltd. *working as security guards*, at 240 Attwell Drive, 251 Attwell Drive, 254 Attwell Drive, 255 Attwell Drive and 27 Marmac Drive in the Municipality of Metropolitan Toronto, save and except General Manager and persons above the rank of General Manager.

The applicant submits that the words “working as security guards” should not be included in the description. Hawk and Wakenhut submit they should be. As a result of that issue, there is also a dispute between the parties with respect to whether Jeanne Hiles (“security reception”) and Shirley Kibyuk (“security switchboard”) should be included in the bargaining unit. The applicant asserts they should be included. Hawk and Wakenhut assert that they are “clerical” employees who have no community of interest with the security guards in the bargaining unit and should therefor be excluded.

25. Upon an examination of the materials filed, and the membership evidence submitted by the applicant in support of this application, it was apparent that the disposition of the bargaining unit description issue and the employee list issue between the parties could not affect the applicant’s right to be certified. Whether or not the disputed words or employees are included in the bargaining unit description or on the list of employees respectively, more than 55 percent of the employees in the bargaining unit were members of the applicant on June 25, 1993, which is the cer-

tification application date and the date on which employee support for the application is ascertained under section 8(1) of the Act.

26. The Board therefor found it appropriate to exercise its discretion under section 6(2) of the *Labour Relations Act* to certify the applicant on an interim basis, effective July 26, 1993 (the date of the hearing and the Board's oral ruling in that respect), as the bargaining agent for the bargaining unit described in paragraph 24 above, pending resolution of the matters remaining in dispute.

27. We note that there is no interim certification "document" other than this decision (see, *P&M Electric Limited*, [1989] OLRB Rep. Oct. 1064; and for a discussion of the Board's practice in this respect and the effect of interim certification in general see *Comstock Funeral Home Ltd.*, [1982] OLRB Rep. Oct. 1436).

28. With respect to the matters remaining in issue, the Board authorizes a Labour Relations Officer, to be designated by the Board's Manager of Field Services, to inquire into and report to the Board with respect thereto.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; August 5, 1993

1. The decision as written undoubtedly accords with both the law and Board practice. However, I feel obliged to reflect on the question of the exercise of our discretion under section 8 in light of the application for certification of Hawk employees resulting in the certification of the employees of a totally different employer, Wakenhut.

2. It seems to me that during the organizing stage employees were being asked if they wished to be represented by the union in their employment relationship with Hawk. Based on hearsay evidence, in the form of membership cards, it would appear the question was answered in the affirmative by more than 55% of Hawk's employees. Although it is agreed that Wakenhut now stands in the shoes of Hawk it strikes me the question "Do you wish to be represented by the Steelworkers in your employment relationship with Wakenhut?", has not been put to either the seven (7) former employees of Hawk, now employed by Wakenhut, or the six (6) employees hired by Wakenhut.

3. While I do not feel the Steelworkers, as opposed to any other union, should be required to go through a second organizing effort, I would have thought the Board might wish confirmatory evidence as to the wishes of Wakenhut employees, inherited or hired directly, and that the confirmation should come in the form of a secret ballot vote.

4. In other words I feel the Board, in cases such as this, should regard an application for certification as being employer-specific. Had Hawk and Wakenhut been related companies my view might have been different.

2848-91-M; 3494-91-R; 3677-91-U Christian Labour Association of Canada, Applicant v. **Ledcor Industries Limited**, Responding Party; Labourers' International Union of North America, Local 183, Applicant v. **Ledcor Industries Limited**, Responding Party; Labourers' International Union of North America, Local 183, Applicant v. **Ledcor Industries Limited**, Responding Party v. **Christian Labour Association of Canada**, Intervenor

Certification - Collective Agreement - Parties - Reconsideration - Timeliness - Labourers' union seeking reconsideration of decision to grant early termination of collective agreement between CLAC and employer on ground that posting of Notice to Employees was inadequate - Labourers' union filing certification application in what would otherwise have been open period of collective agreement - Labourers' union having sufficient interest to justify granting standing in its own right to seek reconsideration of early termination decision - Board finding posting of Notice to Employees inadequate - Institutional interest of Board in providing adequate notice to affected employees outweighing reliance interest of company and CLAC on finality of Board's early termination decision - Reconsideration application allowed - Upon counting of ballots, Labourers' certification application dismissed

BEFORE: *Susan Tacon*, Vice-Chair, and Board Members *D. A. MacDonald* and *R. R. Montague*.

APPEARANCES: *A. M. Minsky* and *T. Dionisio* for the applicant; *Stephen A. McArthur* and *James Rosien* for the responding party; *Elizabeth Forster* and *Ron Rupke* for the intervenor.

DECISION OF THE BOARD; August 17, 1993

1. Board File No. 2848-91-M is an application for early termination of the then current collective agreement between Ledcor Industries and the Christian Labour Association. Board File No. 3494-91-R is an application for certification by the Labourers' International Union of North America, Local 183. Board File No. 3677-91-U is a section 91 complaint alleging violation of specified sections of the *Labour Relations Act*. The matters were heard together and a decision issued dated March 10, 1993 in which the Board, with reasons to follow, revoked its decision of December 19, 1991 granting the early termination of the collective agreement between Ledcor Industries ("Ledcor" or the "company") and the Christian Labour Association of Canada ("CLAC"). The consequence of that revocation was to render the certification application by the Labourers' International Union of North America, Local 183 ("Local 183" or the "Labourers") timely. In that certification application, the Board had conducted a pre-hearing representation vote wherein there were a number of segregated ballots due to challenges to the eligibility of those persons to vote by one or more of the parties on various grounds in addition to the assertion by Ledcor and CLAC that the application itself was untimely and, accordingly, the ballot box was sealed.

2. The Board, in the March 10, 1993 decision, dealt only with the reconsideration request, on the agreement of the parties, given that the Local 183 certification application would be untimely unless the reconsideration was granted and given that the section 91 complaint did not touch on the issues raised in the reconsideration request. The Board, therefore, directed the Registrar to realist these matters for hearing to deal with the remaining issues. Prior to the date scheduled for continuation of the hearing, the parties informed the Board that all remaining matters had been resolved between them. It is appropriate to set out that settlement:

MINUTES OF SETTLEMENT

BETWEEN

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

("Local 183")

- and -

LEDCOR INDUSTRIES LIMITED

("Ledcor")

- and -

CHRISTIAN LABOUR ASSOCIATION OF CANADA

("CLAC")

RE: OLRB FILE NUMBERS 2848-91-M; 3494-91-R; 3677-91-U

Local 183, Ledcor and CLAC agree to resolve and finally settle all matters outstanding between them as follows:

1. Ledcor shall pay to Local 183 on or before May 28, 1993 the sum of Eight Thousand, Five Hundred Dollars (\$8,500.00) which sum shall represent a full and final resolution of all matters outstanding in respect of complaints of unfair labour practice filed with the Ontario Labour Relations Board by Local 183 as set out in the above-captioned Board file numbers;
2. Ledcor, Local 183 and CLAC agree that all ballots cast in the representation vote conducted in accordance with the Board rules in respect of the above-captioned Board matters shall be counted, save and except that the ballots cast by the following shall *not* be counted:
 - i) Beauclair, Jr.
 - ii) Bento
 - iii) Carpino
 - iv) Cunha
 - v) Orfao, (did not vote)
 - vi) Sconza
3. Ledcor, Local 183 and CLAC agree that the terms of these Minutes of Settlement shall constitute the full and final resolution of all matters outstanding between them and, for further clarity, agree that upon the payment of the sum set out in paragraph 1 above and the counting of the ballots in accordance with paragraph 2 above, all matters outstanding in the above-captioned Board files shall be settled and resolved.

Dated at Toronto this 21st day of May, 1993

3. Having regard to the minutes of settlement, the section 91 complaint is resolved on the terms described therein. The Board regards this matter as terminated.

4. As noted in the minutes of settlement, the parties also resolved the dispute in connection with the segregated ballots. The parties signed a consent and waiver form wherein is indicated those persons who are agreed to be eligible for inclusion in the bargaining unit and whose ballots should be counted and those persons who are agreed should not be included in the bargaining unit and whose ballots should not be counted. The parties consented to an immediate counting of the

ballots cast in the representation vote held on February 27, 1992 and waived any objections as to the regularity and sufficiency of the balloting.

5. The results of the representation vote were that not more than fifty per cent of the votes cast were cast in favour of the applicant Local 183. Accordingly, the Board dismisses the certification application.

6. In informing the Board of the settlement of the remaining matters, the parties joined together in asking that the Board issue the reasons for its decision revoking the Board's approval of the early termination application. In the parties' view, the issues raised in the reconsideration request are of sufficient importance that written reasons from the Board would benefit not only the parties, but the construction industry and the labour relations community in general.

7. The Board is persuaded that it is appropriate to issue the reasons for the revocation, pursuant to its discretion in section [now] 108(1) of the Act, of the granting of the early termination application and for its oral ruling, with reasons to follow, that Local 183 had status in its own right to bring the reconsideration application.

8. The Board first deals with the standing of Local 183 to bring the reconsideration application. That ruling followed submissions by the parties which are briefly summarized.

9. Counsel for Local 183 asserted that Local 183 had an independent right of standing to bring the reconsideration application as its interests were directly affected by the early termination application. That is, the open period during which Local 183 would otherwise have been able to bring its certification application would be closed through the granting of the early termination application. Counsel asserted that the first Local 183 was aware of the early termination application and the Board decision was through the intervention by CLAC in the Labourers' certification application. Upon learning of the granting of the early termination of the collective agreement, Local 183 acted promptly in seeking reconsideration of the Board's decision. It was contended that, since Local 183 would have had the right to intervene in the early termination application itself had it had notice of the matter, Local 183 had a right to seek reconsideration of the decision granting the early termination application given that Local 183 had no notice of those proceedings. Counsel submitted that Local 183 did represent employees of Ledcor at the time of the early termination application and, while the union would be prepared to disclose that information to the Board, the union would seek to maintain the confidentiality of the identity of its supporters. In the alternative, counsel asserted that Local 183 was prepared to amend the application for reconsideration to add individual employees of Ledcor as co-applicants but, again, for reasons of confidentiality, preferred not to have those names disclosed.

10. Counsel for CLAC acknowledged that an employee at the time of the early termination application would have standing to bring the reconsideration application. Otherwise, it was submitted, Local 183 was required to disclose its membership evidence as at the early termination application period to substantiate its claim to represent employees in the bargaining unit at the material time and, thus, be entitled to bring the reconsideration application.

11. Counsel for Ledcor concurred with the position of counsel for CLAC. Counsel submitted that whether or not Local 183 was planning an organizing campaign in December 1991 was irrelevant; what was critical was whether Local 183 represented employees of Ledcor at that time. It was argued, therefore, that the status of Local 183 to bring the reconsideration application was solely dependent upon establishing representational rights with respect to at least one employee at the time of the early termination application.

12. The parties referred to or commented on a number of decisions in support of their respective positions, including: *Atlantic Packaging Products Ltd.*, [1980] OLRB Rep. Jan. 4; *The Continental Group of Canada Ltd.*, [1980] OLRB Rep. Oct. 1381; *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185; *Connie Steel Products Limited*, [1987] OLRB Rep. Oct. 1225; *Image Painters L.M. Inc.*, [1988] OLRB Rep. Aug. 807; *Mathers Concrete*, [1988] OLRB Rep. Aug. 830; *Ridgewood Industries*, [1990] OLRB Rep. March 331; *Vissers Nursery*, [1990] OLRB Rep. Sept. 989; *P.H. Atlantic Plumbing & Heating Division of 629629 Ontario Limited*, [1991] OLRB Rep. Jan. 97; *Ridge Landfill Corporation*, [1991] OLRB Rep. Aug. 1002; *Cunningham Drug Stores Ltd. v. British Columbia Labour Relations Board et al.* (1972) 31 D.L.R. (3d) 459 (SCC); *Sandercock Construction Limited*, [1970] OLRB Rep. Jan. 1252; *Di Lorenzo Construction Company*, [1970] OLRB Rep. Apr. 33; *Delcon Electric Limited*, [1976] OLRB Rep. July 362; *Goldcrest Furniture*, [1989] OLRB Rep. Apr. 355.

13. The Board commences its analysis with the source of its authority to reconsider its decisions in [then] section 106(1) of the Act:

“The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but, nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.”

That authority, on its face, grants the Board a broad discretion to determine the circumstances in which its section 106(1) jurisdiction should be exercised. The Board’s jurisprudence has outlined the various factors which the Board considers in determining whether to exercise its discretion: *K-Mart Canada, supra*; *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096.

14. At this point, however, the Board must determine the issue of the standing. There was no real dispute on the usual formulation of the principle, that is, that “standing” is restricted to “interested parties”, to those whose rights are “affected” by a proceeding. It was conceded by counsel for CLAC and Ledcor, for example, that an employee of Ledcor at the time of the early termination application could seek to have the Board’s decision reconsidered, whether or not the request should ultimately be granted. The question is whether Local 183 is such an interested party in its own right or whether its standing to bring the reconsideration application is dependent upon demonstrating (at least to the Board, given issues of confidentiality of membership evidence) that it represented one or more employees of Ledcor at the time of the early termination application. Counsel for CLAC and Ledcor argue that it is only in those latter circumstances that Local 183 would have standing before the Board.

15. In the Board’s view, the issue of standing is intrinsically related to the substantive proceeding in which a party seeks to participate. What might be required to demonstrate the requisite “interest” in a certification application, for example, could well be different from the factors influencing the Board to grant or withhold standing in an unfair labour practice complaint. Thus, it is appropriate first to examine the provision of the Act which gave rise to the reconsideration application, section [then] 53(2), permitting the early termination of a collective agreement on the joint application of the parties with the consent of the Board.

16. In that regard, it is useful to set out the oral reasons of the Board in *Ridgewood Industries, supra*, wherein the Board dismissed an application for early termination of a collective agreement:

8. ... parties to a collective agreement are given wide latitude to make amendments or adjust-

ments to their collective agreement should they so choose. Section 52(5) of the *Labour Relations Act* makes that clear:

Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

In addition to that one proviso, section 52(3) of the Act also stipulates:

A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

That sole exception to the ability of the parties to order their own affairs reflects a clear policy on the part of the Legislature to preserve the two month "open period" established by the statute for the bringing of representation applications. The requirement for Board consent is set out in the Act and is well known, as is the fact that what the Board effectively does is to act as an intermediary to ensure that notice of the parties' intention to alter the term of their existing collective agreement is posted in the workplace. That posting often produces no objection, and the Board grants its consent as a matter of course. Where it does produce an objection, however, it is difficult to conceive of a case where the Board *would* grant the early termination in a way that would abridge the rights initially guaranteed by the Act. Certainly the Board is unaware of any case to date that has done that; at best, the Board has sought to accommodate the interests of those seeking to implement a new collective agreement by moving the open period forward -- but that has always been done on advance notice to any interested parties, by way of the Board's decision in the application, and never for a period less than the two months that the legislators originally held to be appropriate.

Here the parties have only 10 days of the prescribed open period left to run. Or to put it conversely, as Mr. Fishbein has, any interested party already has had the benefit of 50 of the 60 days that the open period was projected by the statute to run. We are not prepared, however, to try to decide in each individual case whether "50" days should be considered to be "enough", or "40", or "30", or "20"; the "open period" chosen by the Legislature is specifically prescribed to be two months, and we are not persuaded that the intention of the Act would be met by a decision to shorten that period to something less.

17. The thrust of the jurisprudence is that the legislative intention was to preserve an open period at readily identifiable intervals during which the employees could exercise their right to choose (i.e., change) their bargaining agent. That right overrides the ability of the parties to amend the expiry date of their collective agreement except on Board consent which, as noted, is only granted if no objections are filed with the Board in the period specified in the notices of the early termination application which are required to be posted. Where there are such objections, from employees themselves or from another trade union asserting it represents one or more of the employees, the Board acts to preserve the open period: See generally, *Firestone Tire & Rubber, supra*; *National Cash Register, supra*; *Canada Building Materials, supra*; *Standard Products, supra*; *Ridgewood Industries, supra*.

18. In the Board's view, it is a corollary to the right of the employees to choose their bargaining agent that another trade union has the right to challenge the representational rights of the incumbent trade union during the open period. It is only through preserving the rights of another trade union to seek to persuade the employees to support it, rather than the incumbent, that the rights of the employees to freely choose their bargaining agent are given meaning. Similar sentiments were expressed in *The National Cash Register Company of Canada Limited*, [1967] OLRB Rep. Apr. 90. In that case, in discussing the right of another trade union to intervene in and object to an early termination application, the Board commented:

4. It is true, as counsel for the company pointed out, that the intervener cannot rely on any

'right' to organize established under the *Labour Relations Act* since the Act makes no reference to organizational campaigns. There is undoubtedly, however, a right of employees to join the trade union of their choice (section 3) and for this right to have any practical value there must be the concomitant possibility of the chosen unions applying for certification at a time when it would be possible to do so.

5. Counsel for the applicant trade union urged that the intervener should be required to show a substantial degree of successful organization among employees of the company before the Board would give serious consideration to its objection. On this count, it is noteworthy that in the *Firestone* case the Board preserved an open season even though there was no evidence whatever that any other union sought to represent employees. It is our view that the Board ought not to attempt to assess the changes (sic) of success of any union's organizational campaign nor should it attempt to establish what might constitute a 'substantial degree of successful organization' in any particular case.

19. In the instant case, Local 183 filed an application for certification in what would have been the open period of the collective agreement had the Board not granted the early termination application. That certification application was supported by a sufficient number of employees to entitle it to a pre-hearing representation vote. Local 183 was met with an assertion that its application was untimely, barred by the existence of the collective agreement entered into by Ledcor and CLAC following the Board's consent to the early termination of the earlier collective agreement. The Board regards that as sufficient interest to justify granting standing to Local 183 in its own right to seek reconsideration of the early termination decision. Local 183 is directly affected by the initial determination by the Board in December 1991 that the extant collective agreement be terminated. Unless Local 183 has the opportunity to seek reconsideration of that decision, Local 183 will be unable to challenge the representational rights with respect to the employees in the bargaining unit until the open period of the replacement collective agreement.

20. The Board's conclusion in this regard is not dependent upon Local 183 demonstrating membership support by at least one employee of Ledcor at the time of the early termination application. Rather, the relevant time is the point at which the certification application is filed, provided that the application is filed within what would have otherwise been the open period of the collective agreement whose expiry date was amended by the Board. The Board also considers it appropriate to restrict the granting of standing to a trade union which actually files a certification application in the period just described and which application is not dismissible on its face. These criteria, in the Board's opinion, adequately balance the legitimate interests of the incumbent trade union and the employer in avoiding unnecessary disruption to their affairs and of the Board in the finality of its decisions. The Board is concerned with protecting the rights of the employees in the bargaining unit during the open period to select (or change) their bargaining agent, as intended by the Legislature. Those employee rights can only be adequately protected by permitting a trade union which has solicited the support of those employees and filed a certification application seeking to displace the incumbent trade union to request reconsideration of the Board's decision to grant early termination. For it is the Board's consent to the early termination of the collective agreement then in force which enabled the company and the incumbent trade union to enter a new collective agreement which would otherwise constitute a bar to the certification application.

21. The Board finds support for its analysis in the jurisprudence quoted above and in *Atlantic Packaging Products, supra*, wherein two trade unions who demonstrated membership support as at the time of the reconsideration request were granted standing to seek reconsideration of the Board's decision, several months earlier, to certify a third trade union.

22. This approach also preserves the confidentiality of the identities of the employee supporters of the trade union seeking to displace the incumbent. The trade union, in this case Local 183, need only point to its certification application wherein it was entitled to a pre-hearing vote, to

demonstrate its membership support. The trade union need not disclose, in the reconsideration application, the actual membership evidence to have sufficient standing to seek reconsideration of the decision granting early termination. Nor, by implication, need the reconsideration request be supported by named employees.

23. The foregoing are the reasons for the Board's ruling, given orally, that Local 183 has the standing in its own right to bring the reconsideration request.

24. The Board next turns to the merits of that request and to the reasons sustaining the Board's decision issued in bottom line form in March 1993 revoking the decision in December 1991 granting the early termination of the collective agreement. In so doing, the Board first gives its factual findings, followed by the submissions of the parties and the reasons themselves.

25. In reaching its findings of fact, the Board has weighed and assessed the testimony of the fourteen witnesses, including their relative credibility, in the context of the documentary evidence and what is reasonably probable in the circumstances. Much of the evidence was not in dispute and, of the contradictions in the testimony, most dealt with minor details. Where it is necessary to resolve contradictions in the testimony, the Board has done so.

26. Ledcor is a construction company whose origins are in western Canada and which commenced operations in Ontario in 1986-87. The company is involved in several areas of construction, including the utilities field. J. Rosien is the Vice-President and District Manager for Ontario. The company's head office is in Mississauga with a small managerial staff and secretarial support. As well, the company maintains a facility in Bolton which is used for the repair and storage of equipment and materials and consists of a large building (primarily divided into garage bays) and a fenced yard. The mechanic (A. Jackson) regularly works at Bolton. A few other employees work there from time to time. At the relevant period in late 1991 and early 1992, the company had employees working at two job sites in Toronto: near the intersection of Leslie and Hwy. 401 (the "Leslie/401" site) and in downtown Toronto at King and Strachan (the "King/Strachan" site). Those employees, with a few exceptions to be noted, directly reported to and departed from their work sites in the morning and evening. The Board deals with the activities and movements of the employees in more detail below at paragraphs 40-44.

27. The bargaining unit employees are represented by CLAC as a result of voluntary recognition granted in the spring of 1990 for the geographic area described as Board Area 8, essentially the Metropolitan Toronto area. The collective agreement for which Ledcor and CLAC sought early termination was the first between the parties, with a two year term expiring in February 1992. Bargaining rights for employees in the Ottawa area, Brantford/Hamilton and Simcoe County were subsequently obtained by CLAC, also through voluntary recognition. It is unnecessary to describe the geographical areas with any greater precision. At the relevant time, there existed four collective agreements covering the employees in each area. While the agreements were entered into at varying times (as CLAC received voluntary recognition in each area), all four had a common expiry date of February 28, 1992. It should be noted that CLAC also represents Ledcor employees in Alberta and British Columbia in several sectors of the construction industry.

28. In October 1991, Rosien wrote to R. Rupke, the CLAC representative, requesting that the parties negotiate special rates in the collective agreements for particular types of contracts which Ledcor hoped to obtain. In the utilities field, Ledcor had bid on and won what were referred to as "specific" contracts with Bell Canada. Bell Canada and Ontario Hydro have a system of permitting contractors to first compete for specific contracts and then, by invitation, to bid on "general" contracts which cover a period of one or two years. Ledcor had been invited to bid on several "general" contracts with Bell. The general contracts potentially represented a new type of work for

the company. Rosien testified that the company felt that, in order to bid competitively, Ledcor needed to negotiate different wage rates for that category of contract. In his letter, Rosien referred to the special rates in the collective agreement between CLAC and Jen-Ry, another contractor in the utilities field.

29. The parties met on November 21, 1991 to negotiate. Several persons, including Rosien, represented the company. The union bargaining committee consisted of Rupke (the senior CLAC representative), D. Schreiber (another union official) and employee members from areas where the company then had projects. Rosien outlined his concern with competitiveness and the company's desire to have certainty in its wage rates for bidding purposes. In the ensuing discussion, Rupke raised the issue of the early termination of the extant collective agreement. Rupke explained the process to Rosien who was unfamiliar with the statutory provision regarding early termination of collective agreements. On that day, the parties concluded negotiations, subject to ratification by the employees, and agreed to proceed with an application for the early termination of the Toronto area collective agreement. In Rupke's view, such a process made sense in the circumstances. The changes sought by the company with respect to the rates for the general contracts would have to be ratified by the members. Further, the parties would be commencing negotiations relatively soon, in January 1992, for a renewal of that collective agreement. Rather than go through the negotiation and ratification process twice, Rupke considered it preferable to seek early termination of the 1990-92 agreement and enter into a new collective agreement. Rupke testified that, in his opinion, circumstances would not change between November 1991 and January 1992, when bargaining for a renewal collective agreement would otherwise take place; there was no reason not to deal with all matters at the same time.

30. Rupke was informed by Rosien that all employees in the Toronto area were working at the Leslie/401 site. Rupke went to that site, spoke with every worker there and handed out a notice of a union meeting to ratify the collective agreement for 1992-94. The notice of meeting was not posted at the Bolton facility. The CLAC meeting was held after work on November 26, 1991 at a restaurant near the site. Six bargaining unit employees attended in addition to Rupke and Schreiber on behalf of CLAC. Rupke outlined the proposed changes to language and wages in the new collective agreement and explained the rationale for the changes. Those attending were given handouts containing the proposed changes. With respect to compensation, the proposed agreement provided for no increase for July 1992 (July being the usual date for an annual raise) and wage rates reduced by 10% for general contracts. Evidently, wages had been raised by 6% in July 1991. Rupke felt that, given the current conditions in the construction industry, it was not unreasonable to suspend the expected wage increase in July 1992 but review the compensation issue in December 1992. Further, Rupke indicated that the company and the union would be applying to the Board for early termination of the current collective agreement before its scheduled expiry on February 28, 1992 so that the new terms could be implemented earlier. There were questions with respect to some provisions in the proposed agreement, although no objections were raised regarding the impending application for early termination of the current agreement. The proposed collective agreement was ratified unanimously in a secret ballot vote.

31. It is appropriate to note at this point that the negotiations with the company concerned the provisions of all four collective agreements, covering the Toronto area, Ottawa area, Brantford/Hamilton and Simcoe County. Ratification votes on the proposed changes were held in Toronto, as noted, and in Ottawa on December 1, where the meeting paralleled that in Toronto. No votes were taken in Brantford/Hamilton or Simcoe County as there were no employees working on projects in those areas at that time. The company and CLAC only applied for early termination of the Toronto area collective agreement; the other three agreements were permitted to run their course before the negotiated changes took effect. Rupke testified that it was only with respect

to the Toronto area that the start dates of the upcoming general contract bids were an issue. The Ottawa project was winding down at the time of the ratification meeting and there were no bargaining unit employees in that area in the relevant period. Rupke testified that it was decided not to seek an early termination of the Ottawa collective agreement as Ledcor was not bidding on general contracts in that area. It is useful to note here, however, that the company was not successful in obtaining general contracts with Bell in the Toronto area for some time. Ledcor did receive a Bell general contract in April 1992 for the Ottawa region. As well, Rosien's letter of October 30, 1991 which led to the early negotiations specifically stated that "...we plan to bid approximately 15 to 20 Bell General Contracts in South Central and Eastern Ontario..." and "Time is of the essence. The Hamilton and Niagara contracts bid on November 19, 1991."

32. Following the ratification meeting, Rupke learned that there were employees at the King/Strachan site and directed Schreiber to visit that location to explain the changes in the new agreement. Schreiber did meet the day after the ratification meeting with three persons at the King/Strachan site: R. Wheaton, J. Sconza and J. Jeronimo. The discussion was relatively brief, in part because of the bitterly cold weather, and focused on the compensation provisions. Schreiber did mention that CLAC and Ledcor would be applying for early termination of the current collective agreement; no objections were raised regarding that issue.

33. Rupke prepared the application for early termination of the current collective agreement. Rupke used as a model an early termination application Rupke had been involved with previously with another company. Rupke, Schreiber and P. Pound signed the application on behalf of CLAC. P. Pound was a member of the Toronto bargaining unit, had sat on the bargaining committee and was a union steward at the Leslie/401 site. The application was delivered by hand to the Mississauga location for management to sign and then forwarded to the Board. The Board followed its usual procedure for dealing with such applications: a terminal date was set, notices were forwarded to Ledcor for posting and a notice of posting was returned to the Board signed by Rosien. As no objections to the application were received by the Board by the terminal date, the Board issued a decision dated December 19, 1991, granting the early termination. The new collective agreement was signed by Ledcor and CLAC on December 23, 1991, following notification of the Board's decision, in order to implement the terms of the renewal agreement as of January 1, 1992, as intended. The Board next recounts the details of the posting.

34. Rosien and Rupke spoke by telephone regarding the posting. Both agreed that there was no place at the Leslie/401 site to affix the posting. Rupke could not recall if the King/Strachan site was similarly discussed. Rupke testified that Rosien indicated that the postings would be at the Bolton facility and the Mississauga office. Rupke testified that he asked Rosien if there was anywhere closer to the work sites to post the notices and was informed that there was not. In Rupke's view, the postings were the responsibility of the employer, as directed by the Board; he made no suggestions to Rosien as to where to post the notices. However, Rupke was also of the view that the employees were well aware, through the ratification meeting and discussions with those not at the meeting, that there would be an application for early termination. Rupke testified that he regarded the Board's directions as literally to "post" the notices, rather than to bring the notices to the attention of the employees affected in any way possible.

35. Rosien received the material from the Board, including the directions that he post the notices of the early termination application. He posted one copy of the Board notice of the early termination application at the Mississauga office near the back door in the vicinity of the mail slots where the cheques are picked up for delivery to the workers on the project sites. Two other copies were affixed to a wall in the Bolton facility near the lunch room and washroom, an area north of the garage bays. That location had been used for posting other material, such as health and safety

notices. There, the Board notices were posted in single sheets in the English and French versions. Another copy, stapled together, was placed in a plastic covering and taped to the outside of the southwest door into the bays at the Bolton facility; that door was the one generally used by employees entering the building. An employee, J. Beauclair Jr., assisted Rosien in taping that notice to the door. The other copies were posted by Rosien alone. All documents were posted on Monday morning, December 9, 1991. Rosien removed the documents on the evening of December 16 and faxed the Declaration of Posting Form to the Board.

36. Rosien testified that he regarded those locations as fulfilling the Board's directive that the notices be posted "in conspicuous locations where they are most likely to come to the attention of all employees who may be affected" by the early termination application. In Rosien's view, there was no suitable location to post the material at either the Leslie/401 or King/Strachan sites. Rosien acknowledged that a used trailer had been delivered to the King/Strachan site on the morning of December 11, 1991 but, as the trailer needed repairs and lacked heating, he thought that the trailer would not be used by employees at that point. The trailer was repaired and heating installed during the Christmas shutdown from December 20 (the last day worked) to January 6, 1992. Rosien testified that he estimated a good number of the 13 to 15 employees would have visited the Bolton facility during the week of the posting and, in addition, employees were often asked to pick up paycheques from the Mississauga office on Thursdays, for distribution on Fridays on site.

37. Rosien acknowledged in his testimony that the company had, on occasion, put notices in the employees' paycheques when Ledcor wished to ensure workers were informed of a specific matter. For example, the invitation to the Christmas party and a notice regarding theft had been included with paycheques in the past. Rupke, too, indicated that CLAC had used several mechanisms to ensure notices were received by employees from direct mailings to asking the employer to include material with paycheques. In passing, the Board notes that the notice regarding Local 183's certification application was posted in the trailer at the King/Strachan site and, more generally, there is no dispute as to the adequacy of the postings with respect to the certification application.

38. During this period, both Rosien and Rupke testified that they were unaware of any organizing activity by Local 183. Rosien stated that he first became aware in late January when Local 183 filed its application for certification. Rupke indicated that he learned, in the third week of January, from union stewards on site that Local 183 representatives had visited the Leslie/401 and King/Strachan locations. Rosien also testified that he did not realize that the early termination and signing of the new collective agreement would operate to close the open period for a raid by Local 183. Rupke and Schreiber had had a general conversation in August or September 1991 with respect to the possibility of a raid by Local 183. Schreiber was told to make the union stewards on site aware that they should contact CLAC if Local 183 representatives appeared on site. Rupke testified that CLAC was not afraid of the upcoming open season in the collective agreement, that the union knew its members and their expectations. Further, Rupke stated that, given the Board practice not to grant an early termination of an agreement if an employee objected, he would have been stuck with a negotiated deal while a raiding union (Local 183) would have been able to make more attractive promises to the workers. In essence, Rupke implied that the November negotiations and early termination application indicated that CLAC was unaware of Local 183's intentions, rather than evidence CLAC was seeking to close the upcoming open period to avoid a raid by Local 183.

39. Local 183, meanwhile, was indeed preparing to raid Ledcor. Local 183 represents construction workers in the Toronto area in most sectors of the construction industry, including the utilities field. A. Dionisio, the president of Local 183, testified that his union was interested in organizing Ledcor and the employees of another utilities contractor, Jen-Ry, also represented by

CLAC. To this end, he obtained copies of the current collective agreements for both companies which had their open periods commencing in January 1992. Two union representatives were instructed to "keep an eye" on the Leslie/401 and King/Strachan sites in December 1991 so the union would be ready to move once the open period arrived. In late January 1992, Dionisio was informed by representatives trying to organize the Jen-Ry employees that there had been an early termination of the collective agreement. Dionisio asked counsel to investigate and learned that an early termination application had been granted on April 5, 1991 and, thus, there was no open period in January 1992. Dionisio then learned, shortly after the certification application was filed by Local 183 on January 31, 1992, that the Board had granted its consent to the early termination of the collective agreement at Leducor on December 19, 1991. Local 183 representatives spoke to several Leducor employees on site who stated that they did not see any posting regarding the early termination application. The reconsideration request which is the subject of this decision was filed immediately.

40. Considerable evidence was led concerning the activities and movements of the various employees, particularly during the period from December 9 to 16, 1991 when the Board notices were posted at the Mississauga office and the Bolton facility. Some of that evidence was not in dispute. Further, where there are contradictions in the evidence, the Board is of the view that the witnesses were trying to accurately recall events of quite some time ago which were not out of the ordinary at the time, a difficult task at best. It is necessary, however, to deal with this issue in some detail.

41. As noted earlier, the employees working at the Leslie/401 or the King/Strachan sites, with few exceptions, reported to and departed from those sites. A. Jackson, who was not in the bargaining unit, worked as a mechanic at the Bolton facility. In the weeks prior to Christmas, J. Beauclair Sr. also regularly worked at Bolton supervising the repair and winterizing of equipment needed on an upcoming job in Manitoba. Beauclair Sr. is a superintendent at Leducor and not in the bargaining unit. (In January, Beauclair Sr. acted as a foreman at the King/Strachan site in order to learn the utilities end of the business.) J. Smith, a bargaining unit member, regularly worked at Bolton as a mechanic and welder or, when he was not needed at Bolton, as a truck driver making deliveries or driving the float with operating equipment to the work sites. R. Wheaton, also in the bargaining unit, was a truck driver as well. Wheaton reported to Bolton daily in December, prior to the Christmas shutdown, as his truck was parked there each night. Wheaton primarily hauled dirt from the King/Strachan site as the work there progressed but he would also deliver material to the sites as needed or pick up material from suppliers. K. Armitt, also in the bargaining unit, worked at the Leslie/401 site but left his pickup truck at Bolton each evening to prevent theft of tools from the job site. Armitt, Wheaton or Jackson would unlock the facility in the morning. Also regularly working out of the Bolton facility was J. Beauclair Jr. His duties involved driving a truck delivering material or parts to the sites or picking up material from suppliers, helping Jackson and Smith as needed, and cleanup at the Bolton facility. In December 1991, Beauclair Jr. indicated that he would frequently visit the Leslie/401 and King/Strachan sites.

42. There is no doubt that other employees would visit the Bolton yard on occasion to pick up tools or material, if Beauclair Jr., Smith or Wheaton were not available, or to work there for some specific reason. For example, P. Gair worked at Bolton helping get the equipment ready for the Manitoba job. Several employees, including J. Jeronimo and M. Sturino, helped build forms at Bolton. J. Sconza and G. Ducey frequently visited the Bolton facility for various reasons. It appears that some employees never attended at the Bolton yard. For example, Bento testified that he had never been at the Bolton facility. Jackson stated that he had never seen Bento, Cunha or Orfao at Bolton.

43. The evidence was less clear as to which employees visited the Bolton facility during the period from December 9 to 16 when the Board notices of the early termination application were posted. Wheaton, Smith, Beauclair Jr., and Armitt visited Bolton daily. It is also more probable than not that Sconza and Ducey would have been at Bolton during that time. Jackson testified that P. Pound, J. Pound and M. Savitch were at the shop in December but could not say for certain if they were there between the 9th and 16th. Savitch testified that he was at Bolton because a torpedo needed repair and he did see the Board notices although he did not read the document as he already knew that the union would be making an application for the early termination of the current collective agreement. Beauclair Sr. could only place Gair and Jeronimo in the Bolton shop in December. Jeronimo, however, stated that he had been at Bolton building forms and occasionally drove to Bolton with Wheaton but was not at the yard in December. In summary, the Board is satisfied that it is reasonable to conclude that not more than a few of the employees working at the Leslie/401 or the King/Strachan sites were at Bolton during the period the Board notices were posted.

44. Even less often would employees have reason to attend at the Mississauga office. The paycheques were usually picked up by the foremen each week, although Wheaton and Beauclair Jr. had done so on occasion. The Board is not persuaded that it was common for other employees to do so.

45. There was also evidence as to discussions at the job sites regarding the proposed collective agreement and the early termination application. The Board has already noted the occasion Schreiber appeared at the King/Strachan site after the union ratification meeting. Beyond that, Ducey testified that those issues came up in general discussions during coffee breaks. M. L'Hereux likewise testified that the terms of the new collective agreement were discussed during breaks; L'Hereux placed Jeronimo, Wheaton, Cunha and Gair in those conversations at various times. Jeronimo agreed that L'Hereux mentioned that there would be a new collective agreement and that there was talk of an early termination application, although Jeronimo could not recall who else was present. The Board will deal with the impact of these discussions *infra* at paragraphs 60-63.

46. The Board next summarizes the submissions of counsel in highly abbreviated form.

47. Counsel for Local 183 reviewed the standard for granting reconsideration in the jurisprudence. It was argued that the two fold test, that the applicant intended to adduce new evidence which was not previously available on a due diligence inquiry, and that the new evidence would likely make a substantial difference to the outcome, did not apply where, as here, there had been a failure to give adequate notice to Local 183 and the employees, which failure constituted a denial of natural justice. In the alternative, if the usual test applied, counsel submitted that Local 183 satisfied the standard. That is, Local 183 was planning an organizing campaign in December 1991, could not have learned of the early termination application through the exercise of due diligence at the time given the locations where the notices were posted, and the new evidence (the inadequacy of the notice) would make a substantial difference to the outcome of the early termination application. Counsel reviewed the evidence in support of his contention that notice of the early termination application was not posted at all or, in the alternative, the manner in which the notices were posted did not comply with the Board's directions to the employer. It was suggested that there were other mechanisms readily available to ensure all employees received notice of the early termination application. In counsel's view, Local 183 was an interested party and, had the Labourers' objected to the early termination application, the open period, at least, would have been preserved by the Board. It was argued that the company and the incumbent trade union both had an obligation to ensure the Board was acting on accurate information regarding the posting in reaching its decision with respect to the early termination application. Counsel also reviewed the evidence with

respect to the knowledge of Ledcor and CLAC officials of the likelihood of a raid by Local 183 and viewed as suspicious the early termination of solely the Toronto area collective agreement given the upcoming bids on general contracts and the awarding of those contracts. In summary, counsel requested that the Board revoke the early termination of the collective agreement and set aside the renewal contract so that the certification application could be considered. Cases cited in support included: *Firestone Tire & Rubber Company Limited (Leaside Branch)* (1954), 54 CLLC ¶17,078; *Silverwood Dairies Limited, Brantford Branch*, [1967] OLRB Rep. Jan. 837; *The National Cash Register Company of Canada Limited*, [1967] OLRB Rep. Apr. 90; *Canada Building Materials Limited*, [1968] OLRB Rep. March 1210; *Standard Products (Canada) Limited*, [1969] OLRB Rep. Apr. 123; *Saga Investments*, [1970] OLRB Rep. June 312; *Adena Investments Limited*, [1971] OLRB Rep. Jan. 1; *Vroom Developments (Central) Limited*, [1973] OLRB Rep. Nov. 557; *Alwell Forming Limited*, [1973] OLRB Rep. Nov. 559; *Cochrane Nursing Home Limited*, [1974] OLRB Rep. Apr. 204; *Atlantic Packaging Products Ltd.*, [1980] OLRB Rep. Jan. 4; *The Continental Group of Canada Ltd.*, [1980] OLRB Rep. Oct. 1381; *Campbell Red Lake Mines Limited*, [1983] OLRB Rep. May 623; *Trans Continental Printing Inc.*, [1989] OLRB Rep. Nov. 1187; *Ridgewood Industries*, [1990] OLRB Rep. Mar. 331.

48. Counsel for Ledcor submitted that there was no absolute requirement in the jurisprudence that notices be delivered individually to employees. The Board's directive requires that the notices be posted. Further, Local 183 was not entitled to direct notice in any event, that is, notice to a union interested in challenging the incumbent's representational rights was effected through notice to the employees in the bargaining unit. The Board, it was argued, in directing the posting of notices, was balancing the need for expeditious and final determination of the early termination application with adequate notice to the employees affected by the application. Moreover, counsel contended the adequacy of the notice in the instant case must be considered in the context of the other events at the time, including the CLAC meeting to ratify the new collective agreement where the early termination application was mentioned, workplace conversations amongst employees and the visit to the King/Strachan site by Schreiber. Counsel reviewed the evidence in support of his assertion that the notices were posted at Bolton and the Mississauga office and that the notices there satisfied the Board's directions in the circumstances. The lack of a suitable place to post the notices at the work sites was noted. As well, counsel submitted that the evidence indicated a substantial majority of the Ledcor employees visited the Bolton site during the week the notices were posted. Counsel argued that there was no evidence of subterfuge on the part of Ledcor and CLAC to avoid the upcoming open period in the current collective agreement and that absence of illicit motives should be considered by the Board in dealing with the reconsideration request. Counsel asked that the decision granting the early termination application be upheld. Cases referred to included: *Brantford Builders' Supplies Limited*, [1969] OLRB Rep. July 518; *Kilean Lodge*, [1977] OLRB Rep. April 240; *Macdonnell Memorial Hospital*, [1979] OLRB Rep. Oct. 996; *Campbell Red Lake Mines Limited*, *supra*; *Custom Pharmaceuticals Ltd.*, [1986] OLRB Rep. Mar. 315; *Cable Tech Co. Ltd.*, [1988] OLRB Rep. June 562; *Ventra Group Inc.*, [1990] OLRB Rep. Aug. 903; *Vissers Nursery*, [1990] OLRB Rep. Sept. 989; *P.H. Atlantic Plumbing & Heating Division of 629629 Ontario Limited*, [1991] OLRB Rep. Jan. 97; *Ridge Landfill Corporation*, *supra*.

49. Counsel for CLAC reviewed the principles guiding the Board with respect to reconsideration applications and stressed the reliance interest of the parties, as here, in the finality of the Board's decisions. Counsel argued that the weight of the evidence supported a conclusion that the notices had been posted at the Bolton facility and the Mississauga office. With respect to the adequacy of the notices, counsel submitted that the company had followed the Board's directions, that there was no misconduct by Ledcor or CLAC and that the notices had been seen by a substantial majority of employees. Counsel contended that the position of those employees who had not seen the notices because they were not at the Bolton facility or the Mississauga office during the rele-

vant period was no different from those who did not receive notice because of illness or vacation and, thus, should not affect the adequacy of the notices. In essence, counsel contended the notices as posted satisfied the requirements of natural justice. It was asserted that Local 183 was not entitled to direct notice and that the caselaw required more than a mere assertion by Local 183 that it wished to apply for certification in what would have been the open period to warrant reconsideration of the Board's decision granting early termination. Local 183 had to rely on its contacts amongst the employees for notice and, in that regard, the Board should also take into account the discussions about the new collective agreement and the ratification meeting. Counsel also submitted that there was no evidence of improper motives on the part of Ledcor or CLAC in seeking early termination, that the company acted for logical business reasons. In summary, counsel stressed that, to allow reconsideration in the instant case, would undermine the finality of Board decisions where an interested party appeared later seeking to challenge the decision. The notice was adequate in the instant circumstances and the finality of the early termination decision should be affirmed. Cases cited: *Regina v. Canada Labour Relations Board, ex parte Martin et al.*, [1966] 2 O.R. 684 (C.A.); *De Smith's Judicial Review of Administrative Action* (Stevens & Sons Limited, Toronto, 1990); *Re David et al. and City of Welland et al. Allied Tower Merchants Ltd. et al. v. City of Welland et al.*, [1973] 2 O.R. (2d) 679 (Div. Ct.); *Kevton Holdings Ltd.* (1977), 78 CLLC ¶16,116; *Macdonnell Memorial Hospital, supra*; *Northern Construction Company* (1976), 77 CLLC ¶16,071; *O.J. Pipelines Ltd.*, [1984] OLRB Rep. Dec. 1737.

50. In reply, counsel for Local 183 argued that the "word of mouth" notice to employees should not be taken into account given the lack of evidence as to the timing of those discussions and their content. That is, the conversations did not adequately communicate the information contained in the Board notice of the early termination application with respect to the rights of employees to object to the application. As well, the decisions cited by the other counsel were commented on in his submissions that the reconsideration request be granted in the circumstances of the instant case.

51. As noted earlier, the Board is granted a broad discretion in the statute with respect to revocation or amendment of a prior decision (see paragraph 13). The Board has adopted a cautious approach to this authority given the institutional interests of the Board and the parties in the finality of Board decisions. The Board's processes are not to be subject to attempts by parties to repair or reargue a case in which they were unsuccessful at first instance. Likewise, parties are entitled to rely on the finality of a Board decision in organizing their affairs. The legitimacy of these interests is heightened where representational rights are involved. It is sufficient to refer to the following excerpts to outline the considerations which underlie the Board's determination as to whether or not reconsideration should be granted.

"To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶14,132, (Ont. Div. Ct.)"

[*K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185 at ¶4.]

“The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

“Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.”

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly. Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision.”

[*John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096 at ¶5.]

52. In the instant case, the Board determined that Local 183 had standing in its own right to seek reconsideration of the Board's decision granting the early termination of the then extant collective agreement between Ledcor and CLAC. The Board must next consider whether, on the merits, reconsideration should be granted.

53. There can be little doubt that, had Local 183 intervened in the early termination application, the application would not have been granted or, at least, the open period would have been preserved so that Local 183 would have had the opportunity to challenge the representational rights of the incumbent, CLAC: *Firestone Tire & Rubber*, *supra*; *The National Cash Register*, *supra*; *Canada Building Materials*, *supra*; *Standard Products (Canada)*, *supra*; *The Continental Group*, *supra*; *Ridgewood Industries*, *supra*. The jurisprudence on the point and the Board's concerns in dealing with early termination applications were noted in paragraphs 16 and 17 and need not be repeated here.

54. Generally speaking, once the Board grants an early termination application, parties are entitled to rely on the finality of that decision in ordering their affairs. In the instant case, after the Board consented to the early termination of the extant agreement, Ledcor and CLAC proceeded to execute and implement the new collective agreement which had been ratified by the employees. Obviously, the finality of any Board decision and the initial decision in this case is subject to the Board's reconsideration authority. The point is that, at the reconsideration stage, what would otherwise have been a basis for preserving the open period (i.e., the intervention of Local 183) must be balanced against the need for finality. Local 183, in order to succeed in its reconsideration request, must establish more than its attempt to organize the Ledcor employees and its actual application for certification.

55. Local 183 is not entitled to direct notice of the early termination application notwithstanding its interest in organizing the employees of Ledcor. To hold otherwise would effectively nullify the statutory provisions permitting parties to seek Board consent to the early termination of their collective agreement. The Board, on receipt of early termination applications, directs the employer to post notices informing affected employees of the application and their right to file an objection, if they wish, by a specified terminal date. The Board cannot effect similar notice to all

other trade unions who might be interested in challenging the representational rights of an incumbent trade union. This is not merely an administrative matter but, rather, goes to the heart of the statutory provisions regarding early termination applications. The Act addresses the right of employees to join a trade union of their choice (subject to other statutory restrictions); the Act does not speak of organizational rights of trade unions in similar terms. Thus, while Local 183 has a right to standing to bring the reconsideration application in its own name in order to give meaning to the rights of the employees to freely choose their bargaining agent, Local 183 must rely on those employees and the Board's usual posting process to receive notice of a termination application which might ultimately affect its interests by closing or postponing an open period during which the representational rights of the incumbent trade union could be challenged.

56. Whether or not the employees in the bargaining unit informed Local 183 of the termination application is not a matter of concern for the Board. The Board appreciates the difficulty which a trade union may face in acquiring sufficient information to mount a successful raid and in persuading employees to change their union allegiance, particularly in the construction industry where the work sites are less permanent and the work force is often more mobile. But, that is a problem which a trade union seeking to challenge an incumbent's bargaining rights must overcome. What is of direct concern to the Board is whether the employees in the bargaining unit were given adequate notice of the termination application. As the following excerpt from the Registrar's letter to the employer indicates, the Board recognizes that other trade unions may have an interest in the early termination application but considers that notice to such organizations is effected through notice to the employees:

...

The Board is prepared to give consideration to the parties' request that the collective agreement between them be terminated, provided that it is first assured that such action will not prejudice the rights of any interested individual or organization.

Accordingly, you are required to post the enclosed Notice to Employees, in English and in French, immediately. These Notices are to be posted in conspicuous locations where they are most likely to come to the attention of all employees who may be affected by this application. The Notices shall remain so posted for a period of five working days from the posting thereof.

...

Thus, while the Board agrees with counsel for Local 183 that the failure to give notice may well constitute a denial of natural justice, the Board does not agree that Local 183 was entitled to direct notice and can claim a denial of natural justice on the ground that Local 183 did not receive direct notice of the early termination application. That is not a basis for revoking the Board's decision of December 1991 granting the early termination of the CLAC-Ledcor collective agreement.

57. The Board is satisfied that the notices were posted by Rosien in the Mississauga office and at the Bolton facility from the morning of December 9, 1993 to the evening of December 16, 1991. The notices, therefore, were posted for more than the requisite period of five working days. At the Bolton facility, the notices were located on the outside of the southwest door and on a wall in the hallway near the lunchroom. For those employees affected by the application who were at Bolton in the relevant time period, for example, picking up or delivering tools and material, there was opportunity to learn of the early termination application. Likewise, for those employees who travelled to the Mississauga office to pick up cheques or drop off paperwork, the location of the notices there, near the back door in the vicinity of the mail slots was appropriate. The Board heard some evidence from employees who testified the notices were seen but not read because it was known that the union would be making an application to terminate the existing collective agree-

ment before its usual expiry date. The Board has always considered that employees who choose not to read Board notices but rely on other sources of information for knowledge of their rights to be the authors of their own misfortune if their information proves inaccurate: *Cable Tech*, *supra*.

58. The issue in the instant case is one of the adequacy of the posting given the work patterns of the employees, that is, whether the notices comply with the Board's directive that they be posted "in conspicuous locations where they are most likely to come to the attention of all employees who may be affected by this application". Considerable jurisprudence was cited dealing with the adequacy of notice, primarily in certification applications where one party sought an extension of the terminal date. The cases referred to espouse a number of principles or approaches which the Board regards as applicable to the instant case and with which the Board agrees. For example, the case law speaks of the "reasonableness" of the notice in the circumstances, including the size of the bargaining unit, the length of time the notices were posted and their location. It is recognized that employees are not entitled to individual, personal notice and it is expected that, at any point in time, employees may be on vacation or ill. Those circumstances would not warrant an extension of the terminal date or reposting provided that, at the relevant period, a representative number of employees were scheduled to work and would have had the opportunity to read the posting. See: *Brantford Builders' Supplies*, *supra*; *Kilean Lodge*, *supra*; *Macdonnell Memorial Hospital*, *supra*; *Campbell Red Lake Mines*, *supra*; *Custom Pharmaceuticals*, *supra*; *Ridge Landfill*, *supra*; *Silverwood Dairies*, *supra*. Where the Board has concluded that notice was inadequate, the terminal date was extended or the earlier Board decision was revoked: *Saga Investments*, *supra*; *Adena Investments*, *supra*; *Vroom Developments*, *supra*.

59. In the Board's view, the postings in the instant case are inadequate in the circumstances. The Board recognizes that the reference to "all employees who may be affected by this application" is not literal. That is, employees who are ill or on vacation may not see the posting yet such circumstances would not render the notice "inadequate" provided that a representative number of employees were scheduled to work during the relevant period. However, in the instant case, the evidence establishes that employees reported to and departed from the two job sites at Leslie/401 and King/Strachan. The Bolton facility and the Mississauga office are at quite some distance from the work sites. It is accurate to note that a few employees were at Bolton daily and a few others may have travelled to Bolton or Mississauga during the period the postings were up, in order to pick up supplies, drop off paperwork and such like. The Board has detailed its findings regarding the employees' movements *supra* at paragraphs 40 to 44 and those need not be repeated here. However, on balance, the Board is not persuaded that a representative number of employees would have had occasion to visit the Bolton yard or the Mississauga office from December 9 to 16, 1991. Those employees did not have the opportunity to read the Board notices regarding the early termination application. That lack of opportunity is a compelling ground to revoke the Board's decision granting the early termination application.

60. It was argued that the employees had actual notice of the intention of Ledcor and CLAC to apply for early termination and, indeed, that the employees ratified the new collective agreement. Those facts, it was suggested, constituted the "context" which rendered the notice adequate. The Board does not agree. The Board has found, as facts, that there were some on site discussions amongst employees and with representatives of CLAC which touched on the fact that the company and CLAC would be applying for the early termination of the collective agreement. And, there was a union meeting in November 1991 where the new agreement was ratified and the upcoming early termination application mentioned. However, the Board is not satisfied that the evidence establishes that the employees knew, through these discussions and meetings, of their right to object to that application or that the Board might proceed with the application if no objection was filed by the terminal date. In short, there was no actual notice of the Board proceeding

whereby the Board dealt with the early termination application. Furthermore, the Board, in *The National Cash Register Company, supra*, commented that very clear evidence would be required to demonstrate that employees had “waived” their right to object to an early termination application and that “ratification” of a new collective agreement would not necessarily imply the waiver of employees’ rights under the Act or to receive notice according to the usual Board processes. The evidence falls far short, in the instant case, of such knowledge or waiver.

61. Moreover, the Board has an institutional interest in ensuring that its processes and directives are adhered to by the parties. The notice which the employer is required to post reads as follows:

“A JOINT APPLICATION, copy of which is attached hereto, has been made by the above named Employer and Christian Labour Association of Canada.

The aforementioned Agreement would normally terminate on February 28, 1992.

Any person having objection to the granting of such consent shall file the same with the Board, on or before the 16th day of DECEMBER, 1991.

In default of filing a Notice of Objection as aforesaid, the Board may take such action in the matter as may appear to the Board to be just.”

This notice informs the employees directly that objections to the early termination application may be made but must be filed by the date specified and, in the absence of any timely objections, the Board may dispose of the application. It is through this posting that the Board is satisfied that the affected employees are given notice of the application and their rights. In the Board’s opinion, it would encourage needless litigation and undermine the integrity of the Board’s processes to readily accede to an argument by an incumbent trade union and a company that the employees received “actual” notice of the early termination application in lieu of compliance with the Board’s posting instructions.

62. There was testimony that the notices could not be physically posted at the job sites and that posting at the Bolton yard and the Mississauga office was regarded as a reasonable substitute. The Board is cognizant that the exigencies of the construction industry may render compliance with a posting directive somewhat more difficult. However, the Board has dealt with numerous applications for certification or termination of bargaining rights in the construction industry. The focus for those postings is the individual job site unless, for example, the employees report to a marshaling yard before proceeding to the work site and, thus, posting at such a central location would comply with the Board’s instructions. In cases where some job sites were missed, the Board has directed the notices be reposted and the terminal date extended: *Alwell Forming, supra*.

63. Further, the argument that notices could not be physically posted at the job sites is unacceptable for other reasons as well. The employer, on receipt of the Board’s instructions, did not seek a ruling or assurance from the Board that the posting at the Bolton yard and Mississauga office was an adequate substitute. Had Ledcor done so, the issue could have been dealt with far earlier. It is the responsibility of the parties to promptly inform the Board of particular circumstances which might render compliance with the Board’s instructions difficult or impossible. Ledcor chose to rely on its own interpretation of the Board’s instructions; CLAC discussed the issue but was prepared to accede to the company’s view. The Board need not determine what other mechanisms would have constituted adequate notice in these circumstances; to do so, would be speculative at best and perhaps misleading to other parties. It is sufficient to note that parties who do not comply with the Board’s direction that the notices be posted “in conspicuous locations where [the notices] are most likely to come to the attention of all employees who may be affected

by this application” take such action at their own peril. In the instant case, the Board has concluded that the postings, as actually effected, were not adequate.

64. The Board emphasizes that its conclusions are not dependent upon a finding of bad faith or improper motives by Ledcor and CLAC in seeking the early termination of their extant collective agreement. Counsel for Local 183 asserted that the company and CLAC acted as they did in order to close off the upcoming open period and avoid the risk of a raid by Local 183. Some evidence is supportive of that assertion, such as the fact that only the Toronto area collective agreement was terminated early despite negotiations for all four new contracts and the fact that CLAC officials had had a general discussion about the possibility of a Local 183 raid. On balance, however, the evidence is insufficient to establish *mala fides* on the part of Ledcor and CLAC in filing the early termination application. In any event, even assuming complete good faith in the conduct of the parties seeking early termination of their collection agreement, where the Board finds the notice to employees is inadequate, that will be grounds for revoking the Board’s decision granting such early termination.

65. The inadequacy of the notice to employees of the early termination application provides a basis for revoking the Board’s December 1991 decision. Nonetheless, the Board must still consider whether to do so at the behest of Local 183. This determination requires an examination of Local 183’s conduct and considerations of delay and reliance by the incumbent trade union and company on the Board’s initial decision. In the instant case, the early termination was granted on December 19, 1991. The new collective agreement was signed on December 23 to be implemented as of January 1, 1992. The certification application was filed by Local 183 on January 31, 1992. Local 183 learned shortly thereafter of the early termination decision and that the new collective agreement was being raised as a bar to the certification application. The reconsideration application was filed immediately thereafter.

66. The Board is satisfied that Local 183 could not reasonably have known of the early termination application given the inadequacy of the notice to employees of that application. When Local 183 learned of the Board’s December 1991 decision, Local 183 acted promptly to inquire of employees as to whether the notices had been posted and received a negative response. Local 183 then filed the instant reconsideration request. Local 183 cannot be said to have acted with other than due diligence in making inquiries and filing the reconsideration application once it was apprised that the early termination application had been granted. In the Board’s view, the usual criteria for granting reconsideration should be applied to Local 183 and Local 183 has satisfied those criteria in the instant case.

67. The Board is also persuaded that it is appropriate to revoke its December 1991 decision notwithstanding the fact that the new collective agreement was implemented and the absence of improper motives by Ledcor and CLAC in seeking early termination or of fraud on the Board. As noted, the new agreement was executed on December 23, 1991 to take effect as of January 1, 1992. The reconsideration request was filed on February 12, 1992. That is a relatively brief period during which the parties acted in compliance with the new collective agreement prior to notice of the reconsideration application. On balance, the Board considers that, in these circumstances, the institutional interest of the Board in providing adequate notice to the affected employees outweighs any reliance interest of the company and the incumbent trade union on the finality of the Board’s decision granting early termination. Obviously, the calculus may well result in a different result in other circumstances. The Board would weigh such factors as fraud on the Board or other improper motivation in connection with the early termination application, a lengthy passage of time before the trade union seeking to challenge the incumbent’s representational rights learned of the early termination and during which the new collective agreement continued to operate or a

lack of promptness in seeking reconsideration once the circumstances came to light. In such instances, the Board might well refuse to revoke its prior decision or might vary that decision through, for example, the imposition of conditions which ensured an open period at a specified time.

68. For the foregoing reasons, the Board revoked its decision of December 19, 1991 granting the early termination of the collective agreement between Ledcor and CLAC. However, as noted earlier, the certification application by Local 183 was ultimately dismissed. The effect of the Board's revocation, then, has been to delay the implementation of the new collective agreement to the date on which the earlier collective agreement would have expired of its own accord. The parties have resolved the remaining matters in their settlement which the Board set out above at paragraph 2.

2650-90-U Leila Yateman, Complainant v. Canadian Union of Public Employees Local 1974 ("the Union"), Respondent v. Kingston General Hospital ("the Hospital"), Intervener

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Complainant alleging that union's failure to arbitrate her grievance violating duty of fair representation - Board sketching out general framework within which complainant's rights must be determined - Board finding that union acted in good faith and that there was nothing arbitrary or discriminatory in the way union represented complainant - Complaint dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Leila Yateman* appearing on her own behalf; *S. R. Hennessy, Linda Dumbleton, John Bastos, Louie Rodriguez* and *Sue Cupido-Lambert* for the respondent; *M. Jane Smale* for the intervener.

DECISION OF THE BOARD; August 16, 1993

I

1. This is a complaint under section 89 [now 91] of the *Labour Relations Act*, alleging that the respondent trade union has contravened section 68 [now 69] of the Act. That section reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. Ms. Yateman contends that her trade union breached its section 69 duty when the Union settled a grievance she had filed against her employer rather than carrying the matter forward to arbitration. That grievance protests Ms. Yateman's involuntary transfer from "full-time" to "part-time" status which resulted in a change in benefits and take-home pay. Ms. Yateman maintains that her grievance should not have been settled and that the letter confirming the settle-

ment is “discriminatory” because it indicates that the Union is prepared to condone her transfer, while reserving its right to challenge the transfer of someone else. That letter reads as follows:

“Please be advised that CUPE Local 1974 will not be proceeding to arbitration with the above grievance.

This action is taken on a without prejudice basis and the Union is reserving its rights to pursue grievances on future matters of a similar nature.

We appreciate the specific merits of this case and, like the Hospital, hope that this temporary period of part-time employment will result in an improved situation for Ms. Yateman.

The Union, however, does not endorse [sic] temporary assignments to part-time employment as an accepted method or [sic] problem-solving.”

3. The Union replies that its decision not to proceed to arbitration was reasonable in all the circumstances, and, in any event, did not contravene section 69 of the Act. In the Union’s submission, the letter to which Ms. Yateman objects is “standard form”, intended to keep the Union’s options open should similar problems arise in the future. (There was no concrete allegation of differential treatment or evidence that other employees in similar circumstances *had in fact* been treated differently.)

4. It is important to note that this complaint is against *the Union*, not *the Hospital*. The Hospital is not bound by, and therefore cannot contravene, section 69 of the Act. Nevertheless, the Hospital appears in this matter as an “intervener” because it might be affected by any remedy directing that a grievance, long settled, must now be taken to arbitration. For practical purposes, though, the Hospital’s position is the same as that of the Union: the settlement was a reasonable accommodation in all the circumstances, and could not be considered “arbitrary”, “discriminatory”, or undertaken “in bad faith”.

5. This matter came on for hearing before me, in Kingston, on August 4, 1993. The Union and the employer both appeared with counsel and their witnesses. The complainant appeared on her own.

6. In the course of the hearing, I made several rulings, and after hearing the parties’ evidence and representations, I indicated that I would reserve judgement on the merits of the case, and issue a written decision.

7. This decision, therefore, will deal with both the merits of Ms. Yateman’s complaint against her union, and certain collateral rulings that were made at the opening of the hearing. However, because Ms. Yateman was not represented by counsel, and clearly does not understand the process she invoked by filing this complaint, it may be useful if I sketch in the general framework within which her rights must be determined. I will then turn to the initial rulings I was required to make and my ultimate decision on the merits of her complaint.

II

8. The *Labour Relations Act* is the main statute governing collective bargaining in Ontario. The Act is intended to promote orderly collective bargaining, and there are a number of sections regulating the way in which a union is selected or removed, the bargaining process, the contents of collective agreements, and the timing of strikes and lock-outs. The Act defines the rights and obligations of employers, unions and employees, and provides a mechanism for complaint if someone alleges that his/her rights have been violated.

9. The *Labour Relations Act* is not interpreted, administered or enforced by the Courts. The Act is administered by an independent tribunal called the Ontario Labour Relations Board. In some respects, however, the Board proceeds in the same way as a Court - it holds hearings, witnesses give evidence under oath, and Board decisions are legally binding. These proceedings are less formal than those of a Court, but legal rights are in question, and, for that reason, parties appearing before the Board are usually represented by a lawyer. Parties are not *required* to have legal representation, of course; but that is usually a wise thing to do, because it will be necessary to understand the Board's Rules, how a hearing works and the legal principles (or precedents) applicable to the proceeding. The Board does not and cannot advise parties in proceedings before it how those parties can best advance their positions or resist the case being put by the other side.

10. The Board has a field staff which includes a team of labour relations officers. These officers are sometimes appointed to meet with the parties to attempt to facilitate settlement. This is a mediation function - something like marriage counselling - in which the officer meets with the parties to see if there can be a settlement of the problem without the requirement of a formal hearing. But if the case is not settled through this informal process, the next step may be a hearing.

11. If a hearing does take place, it is usually up to the party alleging a breach of the Act to bring forward his/her witnesses, and prove that a breach of the law has occurred. Unlike the Human Rights Commission, the Board does not investigate the complaint or help one side or the other to prepare its case. As in the civil Courts, that is the responsibility of the parties to a proceeding.

* * *

12. It is important to understand that the *Labour Relations Act* is not the only source of rights or obligations in the workplace. There are quite a number of statutes which address particular employment problems; e.g. the *Worker Compensation Act*, the *Human Rights Code*, the *Employment Standards Act* (minimum wages, hours of work, etc.), the *Occupational Health and Safety Act*, the *Pay Equity Act*, and, the *Federal Unemployment Insurance Act*. These statutes all cover different aspects of the employment relationship, and have their own enforcement mechanisms.

13. In a unionized setting, most of the employees' rights, and most of the rules in the workplace, are not set out in legislation at all. They are to be found in the collective agreement which the union and employer re-negotiate every year or two. It is the collective agreement which defines such things as: wage rates, working conditions, job classifications, promotions, demotions, transfers, discharge, seniority rights, filling job vacancies, lay-off procedures, and so on.

14. When interpreting the collective agreement, the general rule is this: management has the right to run its business in the manner it considers most efficient, unless the union or an unhappy employee can point to some specific restriction in the collective agreement. This general approach is usually referred to as the "reserved rights of management" and, in addition, is usually formalized in a "management rights clause" which is typically found near the beginning of the collective agreement. Thus, if the collective agreement provides a specific formula (seniority, for example) for promotions, transfers or lay-offs, that is the formula which the employer and employees must follow. In the absence of some restriction in the collective agreement, an employer is entitled to promote, demote, transfer or assign work in the manner it considers most consistent with productivity and business needs.

15. If an employee believes that the employer has not complied with the terms of the collective agreement, s/he can file a grievance in the way described in the "grievance procedure" found

in the collective agreement itself. But that grievance would not be successful unless the unhappy employee is actually able to *prove* that the employer has breached the terms of the agreement. And, of course, the collective agreement may not cover the employee's particular concern, or may not provide a remedy.

16. What is the relationship between the employee rights (if any) set out in a collective agreement and the "duty of fair representation" prescribed by section 69 of the Act? This relationship is explained in the Guide to the *Labour Relations Act* which was published by the Board some years ago. The relevant portion of the Guide reads:

UNION'S DUTY OF FAIR REPRESENTATION

What is the nature of the union's duty?

The *Labour Relations Act* imposes a duty upon a trade union to fairly represent all of the employees in any bargaining unit for which it has bargaining rights, whether or not the employees are union members. It is a violation of the Act for a union to represent employees in a manner that is arbitrary, discriminatory or in bad faith. If, for example, an employee's complaint concerns the alleged mishandling of a grievance, a breach of that duty will not be established if the employee simply shows that the union could have, or even should have, treated the grievance differently. It is *not whether the union was right or wrong* that is the concern of the Board, but *whether the union's actions were motivated by bad faith, whether it was discriminating against the employee or whether it acted in an arbitrary manner*. For example, the Board has found that a union acts arbitrarily when it *completely ignores* a grievance or where it treats a matter in an indifferent or perfunctory fashion. However, it is not arbitrary for a union to put its mind to the complaint or grievance and honestly decide not to take the complaint or grievance further.

May a trade union refuse to process a grievance or to refer it to arbitration?

A trade union is entitled to make decisions that may adversely affect some employees in the bargaining unit as long as it is not acting on improper motives, and honestly considers the matter.

A trade union is entitled to settle or refuse to process a grievance provided it does not act in a manner that is arbitrary, discriminatory or in bad faith. Indeed, collective agreements often contain provisions requiring the parties to meet and endeavour to settle complaints or grievances short of arbitration. A union is *not required* to process a grievance or refer it to arbitration simply because an employee feels that he or she has a 'good' case or 'wants his or her day in court'. The union is entitled to consider many factors, including the merits of the grievance, the relative chances of success and the interests of the bargaining unit as a whole, in determining how it will deal with an employee's grievance or complaint. Union officials may make honest mistakes or exercise poor judgement, but these occurrences may not in themselves be a violation of the *Labour Relations Act*.

Does the Board resolve the merits of an employee's grievance when the union refuses to refer it to arbitration?

No. While the merits of the grievance may be relevant in assessing the trade union's conduct, the Board will not resolve the merits of the grievance. This is a matter for a board of arbitration or arbitrator established in accordance with the terms of the collective agreement under the *Labour Relations Act*. However, when the union is found to have breached the Act, the Board may refer a grievance to arbitration.

17. These passages from the Guide are merely a summary, in layperson's terms, of the principles which have been developed over the years from countless cases that have been brought to the Board for adjudication. It is unnecessary, at this stage, to review those cases here. It suffices to mention just one of them. In *Catherine Syme*, [1983] OLRB Rep. May 775, the Board described the relationship between the grievance procedure and the duty of fair representation this way:

20. Section 68 [now 69] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining union who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

18. The Board held that a union is not required to carry forward a grievance, simply because an employee is unhappy or demands that the union do so. A union is entitled to consider whether an employee's grievance is one which is covered by the collective agreement and whether the grievance has merit. A union is not obliged to spend substantial amounts of the members' money on cases which are trivial, or on cases which are unlikely to be successful, or because a member "demands his day in court". Unions are also limited in what they can do by what the collective agreement provides, the strength of the evidence in support of the employee's position, whether grievance-arbitration will successfully provide a remedy for the problem, and what, in all the circumstances, "makes labour relations sense". And if the agreement itself is inadequate in some way, that is a matter which has to be dealt with at the bargaining table.

* * *

19. In determining whether there has been a breach of section 69 in the processing of an employee grievance, the Board recognizes that union affairs are conducted in most cases by laypersons, who may not have the skills or training of a lawyer. As the Board said in *Ford Motor Company*, [1973] OLRB Rep. Oct. 519:

In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community.

Nevertheless, the union officials must honestly turn their minds to the merits of the grievance, must honestly assess the available evidence, and must take care not to act on the basis of irrelevant factors or principles. But honest mistakes or errors of judgement, however regrettable, do not amount to a breach of the law. As the Board observed in *ITE Industries*, [1980] OLRB Rep. July 1001:

It is clear that in order to establish a breach of section [68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a “flagrant error” consistent with a “non caring attitude”, or have acted in a manner that is “implausible” or “so reckless as to be unworthy of protection”. In other words, the trade union’s conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee’s concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

Similarly, in *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35, the Board observed:

The Board must obviously use great care in assessing what is and what is not objective justification for a union’s decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union’s by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it - rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense “reasonable” must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

20. I do not think it is useful to further burden this decision with quotes from previous Board cases. Obviously, each case must be considered on its own merits, having regard to the problem which gave rise to the employee grievance, the terms of the collective agreement allegedly violated, and whether, in all the circumstances, the union’s handling of the grievance could be said to be “arbitrary”, “discriminatory”, or “in bad faith”.

21. But it is necessary to set out something of the history of this particular case, because that is linked to the rulings I was called upon to make at the opening of the hearing.

[Paragraphs 22 to 66 omitted: Editor]

67. On the basis of the evidence before me, I am unable to conclude that there is anything "arbitrary" or "discriminatory" in the way in which the Union represented the complainant, nor is there any evidence whatsoever of "bad faith". On the contrary, the Union acted in the utmost good faith. The Union considered the complainant's situation, weighed the facts and evidence as it understood them, and ultimately decided that the grievance should not be litigated because it was neither likely to succeed nor likely to result in any positive benefit to the complainant. The part-time position was not desirable from the complainant's perspective; however, it would preserve her employment, as well as the opportunity to establish that - despite contrary indications - she was able to attend work regularly and perform the duties of a clerk. Given the situation the Union faced, I cannot find that it acted contrary to section 69 of the *Labour Relations Act*.

68. Nor is there anything illegal or unusual in the Union's letter of November 27, 1991 informing the complainant of its decision. The letter contains standard "without prejudice" language and confirms that the Union did consider the special circumstances of Ms. Yateman's case. There is no evidence that anyone similarly situated has been or would be treated differently. There is no "discrimination" on the Union's part, no "bad faith", and nothing which could be considered "arbitrary" as that term is used in section 69 of the *Labour Relations Act*.

69. For the foregoing reasons, the complaint against her trade union is dismissed.

1347-93-M Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414, 422, 440, 461, 1000 and the Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Applicants v. **New Dominion Stores**, a division of the Great Atlantic and Pacific Company of Canada, Limited, Responding Party v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its Local affiliate Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, 429, 545, 579, 582 and 915, Intervenors

Bargaining Rights - Interim Relief - Remedies - Union Successor Status - Alleged predecessor union resisting alleged successor union's application under section 63 of the Act claiming that it has bargaining rights for several thousand employees of grocery chain - Board directing that employees at each store to continue to be represented in their dealings with their employer by the individual union representatives who customarily dealt with employment problems prior to July 1993, pending the Board's determination concerning which union has bargaining rights- Board directing that copies of its decision be provided to all store managers and that copies be posted in each store

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members W. N. Fraser and B. L. Armstrong.

APPEARANCES: James K. A. Hayes, David W. T. Matheson, Paula Turtle, Thomas Collins, Dan Garvey and Harry Hynd for the applicant; Charles R. Robertson, John R. Peardon and Chris Mac-

Donald for the responding party; *Chris G. Paliare, Nick Coleman, Barbara Hillman* and *John Monger* for the intervenors.

DECISION OF THE BOARD; August 12, 1993

I

1. This decision concerns an application for “interim relief” in a proceeding before the Board that is scheduled for hearing “on the merits”, beginning August 9, 1993. It involves the way in which employees are to be represented, and the way in which the parties are to conduct themselves, while their case is before the Board.

2. In order to make this decision easier to read, we will sometimes refer to the parties in abbreviated form. The United Food and Commercial Workers International Union will be referred to as the UFCW. The United Steelworkers of America will be referred to as “the Steelworkers”. The Retail, Wholesale and Department Store Union, AFL-CIO-CLC will be referred to as “RWDSU”. Where we wish to refer only to the parent American organization, we will refer to “RWDSU International”. Geographically defined “local” unions, which are (or were) affiliated to RWDSU, will be referred to simply by their local number (e.g. RWDSU Local 414). New Dominion Stores, a division of the Great Atlantic and Pacific Company of Canada, Limited will be referred to as “New Dominion/A & P” or “the employer”.

3. The provisions of the *Labour Relations Act* to which reference will be made are as follows:

2.1 The following are the purposes of this Act.

1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.

2. To encourage the process of collective bargaining so as to enhance,

- (i) the ability of employees to negotiate terms and conditions of employment with their employer.
- (ii) the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and
- (iii) increased employee participation in the workplace.

3. To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.

4. To provide for effective, fair and expeditious methods of dispute resolution.

* * *

63.- (1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

* * *

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

(2) A party to an interim order may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

II

4. On July 13, 1993, the Board received a successor rights application, filed under section 63 of the *Labour Relations Act*. The purpose of that application is to determine which of several competing unions now represents several thousand employees working at New Dominion/A & P stores in Southern Ontario.

5. Shortly thereafter, the Board received a related unfair labour practice complaint. That complaint, too, involves the activities and rights of the competing unions.

6. In these various proceedings, each of the trade unions makes allegations about the behaviour of the others, and about its own rights under the *Labour Relations Act*. Each union urges the Board to rule in its favour, and declare that it represents the employees mentioned above. Each union urges the Board to find that the opposing union has acted improperly.

7. However, the unions were unable to agree among themselves about how they should conduct their day-to-day affairs while the Board was dealing with their various assertions. Accordingly, on July 29, 1993 the Board made the following interim order:

DECISION OF THE BOARD; July 29, 1993

1. Applications have been filed with the Ontario Labour Relations Board to determine which trade union now represents employees working at a number of New Dominion/A & P stores in Southern Ontario.

2. More than one trade union now claims to represent those employees.

3. The applications raise legal and practical problems which cannot be easily resolved on a short-term, interim basis.

4. On the other hand, a hearing in this matter is currently scheduled to begin before the Board on August 9, 1993. That proceeding is expected to take several days, and will decide, among other things, which union is now entitled to represent the employees.

5. The employer and the various unions all submit that it is important that the employees' right to representation not be prejudiced while this case is being considered by the Board.

6. The employer stresses the importance of its being able to carry on business as usual, so that this dispute between trade unions does not interfere with the interests of the employer or the employees.

7. All parties agree that uncertainty is undesirable. Despite the dispute between unions, employees should know whom to approach for help if they have an employment problem.

8. But the union parties are unable to agree among themselves on any interim arrangement so employees may be fairly assured of union assistance in their dealings with their employer, should they require such assistance over the next few weeks.

9. On July 23, 1993 and July 27, 1993 the Board held a hearing to consider whether it should impose some interim arrangement governing the employer's labour relations while the case is before the Board, and, if so, what that arrangement should be. The various unions and the employer were all represented by lawyers and made submissions about whether an interim arrangement was appropriate, and what such arrangement might be.

10. Having heard the parties' submissions, the Board orders that:

- (1) Until the Board determines which trade union has bargaining rights for and is entitled to represent the employees of New Dominion/A & P stores in its Southern Ontario stores, and unless the Board otherwise directs, the employees at each store will continue to be represented in their dealings with their employer by the individual union representative(s) who customarily dealt with their employment problems prior to July 10, 1993.
- (2) Until the Board determines which union has bargaining rights and is entitled to represent the employees of New Dominion/A & P stores in its Southern Ontario stores, the employer's local store managers and other managerial personnel may continue to deal with the individual union representative(s) with whom they have customarily dealt in respect of employer-employee matters prior to July 10, 1993.

11. The Board wishes to make it clear that in making this interim order, it is not indicating a preference or support for any of the trade unions involved. The Board's concern is to preserve orderly labour relations until the dispute between the trade unions is resolved.

12. Finally, the Board directs that copies of this decision be provided to all of the company's store managers and that it be posted, immediately, in each store, where it will most likely come to the attention of the employees.

8. In this decision we will set out our reasons for making that interim order, and for not making any further direction.

9. It will be convenient to begin with an outline of the way in which these competing union claims have arisen.

III

10. The Steelworkers, the UFCW, and the RWDSU are all "international" unions, with headquarters in the United States, and a significant number of Canadian members. Each of these unions is subdivided into "local" unions, which are subordinate to their "parent" international body (e.g. RWDSU, Local 414). The affairs of the RWDSU and the Steelworkers are governed by their respective international Constitutions. RWDSU "local" unions have their own local by-laws which govern their local affairs.

11. New Dominion/A & P operates a chain of retail food stores in Ontario. New Dominion/A & P has collective bargaining relationships with both the UFCW and the RWDSU.

12. Until recently, New Dominion/A & P has been able to deal with RWDSU or its affiliated locals without having to worry about which of them had bargaining rights for its employees. As long as there was peace within the union family, no one had to consider whether, as a matter of

law, bargaining rights were held by with the parent union, or the constituent local(s). Collective bargaining could proceed and collective agreements could be signed without precise identification of the employees' bargaining agent.

13. However, in these proceedings, the union parties debate whether the employer's collective bargaining relationship is with the RWDSU (International), or with the various geographically defined locals of the RWDSU, or perhaps some combination of the RWDSU and its locals.

14. We might also note that Article 10 of the most recent (1990-92) collective agreement provides that employees working at the employer's retail food stores must become members of "the union" as a condition of employment. Compulsory membership requirements such as this are permitted under section 47 of the *Labour Relations Act*. The union, as statutory bargaining agent, is entitled to negotiate an arrangement which requires membership in the union organization. But again: which union is the bargaining agent which the employees must join?

* * *

15. The UFCW and the RWDSU both represent employees in the retail sector, and for the last couple of years, there have been ongoing discussions between them about merging the two organizations into a single union. In April 1993, those discussions culminated into a formal merger agreement, whereby the RWDSU and the UFCW could eventually become one union. We say "could" because the merger agreement provides rather elaborate procedures for effecting the amalgamation, as well as a procedure for cancelling the merger within the next four years.

16. The details of these arrangements need not be set out here. It is sufficient to sketch in an overview of what was to happen.

17. The merger agreement contemplates separate and different ratification procedures for the Canadian and American sections of the RWDSU. As we understand it, based upon the material before us, the procedure for the American section of the union, involves a vote of delegates from the American affiliated locals at a meeting that was to be held in Pittsburgh on June 12, 1993. A majority of the delegates voting at the Pittsburgh meeting would bind all of the U.S. affiliates to merge (or not) with the UFCW. The American locals would either remain with an independent RWDSU, or merge with the UFCW as a block.

18. It appears that there were different arrangements prescribed for the affiliates in Canada. Delegates from affiliates in Canada were also invited to convene a meeting and vote for or against the proposed merger with the UFCW, and it is asserted that if a majority of the Canadian delegates rejected the proposed merger, each of the Canadian affiliates would be deemed to have disaffiliated from the RWDSU effective October 1, 1993.

19. The vote of approval, or disapproval and deemed disaffiliation, was not dependent upon the outcome of the American vote. In this sense, the Canadian group was entitled, as a group, to choose its own destiny. However, the merger agreement also provided that any Canadian affiliate of the RWDSU could opt to be bound, in advance, by whatever the American majority decided - provided the Canadian affiliate exercised that option before the Americans voted on June 12, 1993. In effect, individual locals also had the option to remain affiliated with the RWDSU, whether it ultimately merged with the UFCW, or remained a separate entity. Locals embracing this alternative did not have to choose disaffiliation. For example, a major local in Northern Ontario chose this local option as a result of a referendum of its local membership, and therefore bound itself to follow the American locals into the UFCW.

20. On June 12, 1993 the American delegates voted to approve merger with the UFCW. As a result of this vote, all American locals and *some* Canadian locals (i.e. those who had exercised the local option mentioned above) were committed to merge with the UFCW. That merger was to become effective on October 1, 1993.

21. On July 10, 1993 delegates from *other* Canadian locals held a meeting in Toronto, and voted *not* to approve the UFCW merger. By that vote, these dissenting Canadian locals were launched on a path leading to disaffiliation from the RWDSU, so long as the disaffiliating locals provided indemnification, and otherwise took the confirmatory steps prescribed in the merger agreement. If this was done, the dissenting locals would be independent, they would assume certain rights and responsibilities formerly held by the RWDSU, and they would receive a share of the property, funds, and assets situated in Canada. For example: Article 16(e)(4) of the merger agreement reads:

Upon disaffiliation, each disaffiliating Local Union, Joint Board and Joint Council shall assume all responsibility and liability in connection with its collective bargaining agreements and indemnify and hold harmless the RWDSU and all RWDSU affiliates and their respective officers, agents and employees and UFCW and all UFCW chartered bodies and their respective officers, agents and employees from any claim or liability, including reasonable attorneys' fees, arising therefrom, and will by their appropriate officers execute a binding written document embodying this indemnity agreement.

There were other stipulations concerning such matters as pension funds which had previously been administered by RWDSU. Again, the details need not be reproduced here.

* * *

22. In these proceedings, the RWDSU (International) submits that the merger agreement is the *only* route which could lead to disaffiliation from the parent organization in a way that could be sanctioned under the RWDSU International Constitution. The merger agreement provides an opportunity for disaffiliation *which is not otherwise available* under the RWDSU Constitution, but, that being so, it is necessary to adhere to its terms strictly.

23. The parent RWDSU submits that if the dissenting locals had properly followed the mechanism provided in the merger agreement and the union Constitution, there would be no cause for controversy. As at October 1, 1993 they would be independent from the parent organization, and they would have an equitable share of the assets and liabilities, rights and responsibilities formerly held by the parent union. But in counsel's submission, they did not follow the terms of the merger agreement, or the terms of the International Constitution by which they were bound. Nor did they or could they disaffiliate *prior* to October 1, 1993, the date mentioned in the merger agreement.

24. The dissenting locals reply that those merger arrangements would not have produced an independent *unified* Canadian organization if locals opted not to merge with the UFCW; and, in any event, the parent international was not intending to act in good faith in the months preceding October 1993. The dissenting locals (now aligned with the Steelworkers) assert that the International proposed to use its powers under the International Constitution to subvert the true intent of the merger agreement, and to steer the disaffiliated locals in the direction of the UFCW. The dissenting locals assert that it was necessary for them to take pre-emptive action to create a unified Canadian presence. And that (they say) is what they did.

25. As we have already noted, on July 10, 1993 delegates from a number of Canadian locals voted not to merge with the UFCW - thereby, it would appear, opting to disaffiliate from the

RWDSU. The following day, those same delegates met again, and purported to create a reconstituted union organization called "RWDSU Canada", with its own Constitution and officers. The delegates then purported to affiliate their RWDSU locals to that new organization: "RWDSU Canada". Finally, "RWDSU Canada", in turn, purported to merge with the Steelworkers, to become a part of or associated with that international union.

26. As a result of these transactions, the applicant(s) contends that the dissenting locals have become part of the Steelworkers' organization (as a retail division of the Steelworkers), and the Steelworkers have acquired the right to represent the employees in the New Dominion/A & P Food stores formerly serviced by the dissenting locals. Those former members of the RWDSU have now (or now must) become members of the Steelworkers.

27. It is easy to say that the Locals scheduled for disaffiliation in October 1993 have found a new "home" in the Steelworkers' union and should not be "penalized" for moving early; however, the actual legal effect of these various transactions is at the heart of the current controversy between the union parties, and will be the subject of a Board hearing that is to begin on August 9, 1993. For present purposes, we should only note that in the material before us, there was no mention of any immediate challenge to the seating or credentials of the delegates attending the Canadian affiliates' meeting on July 10, 1993, nor was there any immediate quarrel with their right to vote against the UFCW merger and consequently in favour of disaffiliation from the RWDSU. But there is a challenge to the creation of "RWDSU Canada", and its subsequent merger or association with the Steelworkers - none of which, the RWDSU contends, could properly be done in July 1993 under the terms of the merger agreement or the International Union Constitution.

28. Essentially, then, the Board is being asked to determine the propriety and effect under the *Labour Relations Act*, of these Constitutional manoeuvres by the dissenting Canadian locals and the parent internationals. But to complicate things a little, the Board also has before it a declaration from a *member* and *employee* of RWDSU, Local 414, stipulating that the UFCW merger agreement was never properly put to the *members* of the local union prior to the selection of delegates for the July 10 meeting, nor were the *members* ever given a proper opportunity, as required by the by-laws of Local 414, to consider a merger with the Steelworkers' organization. That individual further stipulates that when he pointed out the requirement of the Local by-laws for a special membership meeting to address such issues, he was told that no meeting of members would be held because it would cause problems. Finally, the Board has before it petitions signed by a number of employee members of RWDSU locals indicating, among other things, that they do not wish to be members of any division of the Steelworkers. On this interim motion, those declarations have not been tested through cross-examination or otherwise.

29. Nor did the parent RWDSU (International) remain passive while these steps were being taken by the dissenting locals. Its actions are also part of the legal and factual mix, and prompted the unfair labour practice complaint mentioned above.

30. As a result of the events of July 11 (i.e. the purported creation of "RWDSU Canada", the merger with the Steelworkers, etc.), the RWDSU International (the parent union) took the position that the dissenting locals were in breach of both the merger agreement, and the International Union Constitution by which they were bound. RWDSU International, therefore, moved under the RWDSU Constitution, to put those dissenting locals under "trusteeship", suspending their autonomy, removing the authority of their officers, and freezing the assets and bank accounts. RWDSU International advised employers, banks, and other affected parties that, henceforth, the affairs of the RWDSU in Canada would be handled by either a trustee geographically located in New York, or officials from Northern Ontario or other locals who were accompanying

the RWDSU into the UFCW. In other words, the affairs of the dissenting locals would be handled by the parent International Union or those Canadian locals which were in agreement with the International's wish to merge with the UFCW.

31. The RWDSU International asserts that this action is permitted under the Constitution and is necessary to rectify or redress massive violations of the Constitution by the officers of the dissenting locals, who had no right under the Constitution and no authority from the membership, to take the steps they have taken. The applicants (being the dissenting locals, in association with the Steelworkers) contend that the actions of the parent RWDSU International would have taken place in any event and merely demonstrate the power that it could wield to cripple the disaffiliating locals and steer them towards the UFCW. The applicants argue that the actions of the parent, RWDSU International, contravene various sectors of the *Labour Relations Act*.

32. As part of what is described as the "political manoeuvring" of the applicants, it is alleged that a number of the actual *individuals* who serviced the members' needs in the geographic areas represented by the dissenting locals, have quit their employment with the RWDSU and have become employees of the Steelworkers. This leaves the RWDSU International and/or the trustee, without sufficient personnel to service the needs of these local members, because a number of the individuals who have historically done so, have gone over to the rival organization(s). To meet this challenge, the RWDSU International proposes to bring in union representatives from Northern Ontario locals who have opted to merge with the UFCW, as well as to "borrow" a number of union representatives currently employed by the UFCW.

33. We are therefore left with a curious situation in which, we are told, the collective bargaining needs of employees in the dissenting locals should be looked after either by a group of individuals familiar with them but now employed by the Steelworkers, or, alternatively, by a group of individuals drawn from other local unions or from the UFCW.

34. The employer takes no position on these competing union claims. The employer points out that it has collective bargaining relationships with several of the protagonists, and wants only to remain neutral. The employer submits that it is now "caught in the middle" between rival unions.

35. The employer submits that while Constitutional niceties and questions of bargaining rights are being debated between the contending unions, the employer should be entitled to carry on business as usual - including its ordinary labour relations activities. The employer submits that it should not have to choose between rival union representatives who appear at its stores claiming to represent the employees, nor should it have to risk its legal neutrality by seeming to defer to the demands of one or other of the competing groups. The employer urges the Board to prescribe some interim arrangement, preserving the status quo and orderly labour relations until these matters can be formally adjudicated (i.e. for several weeks).

36. The competing unions also urged the Board to prescribe the "status quo", in the interests of the members, and pending adjudication of their rights. But the unions define that "status quo" in their own way and in their own interest.

37. The Steelworkers and the dissenting locals wish to leave in place the representatives who have serviced the members before, but who, of course, may have now declared their loyalty to, and become employed by, the Steelworkers' organization. RWDSU International urges the Board to respect the processes prescribed in the International Union Constitution which, it says, defines the status quo that has been violated by the dissenting local officers. Counsel for RWDSU International refers the Board to the decision of the Court of Appeal in *Astgen, et al, v. Smith, et al*, [1970] 1 O.R. 129, and urges the Board not to depart from its expressed reluctance to interfere

in internal union affairs. In counsel's submission, to tell the RWDSU who could represent its members on an interim basis - indeed, to direct that they be represented by employees of another union - would amount to a serious and unwarranted interference with the rights of the RWDSU established in its Constitution. It would reward the dissenting local officers for their own Constitutional misconduct, and would lead to the disruption of settled collective bargaining relationships.

38. RWDSU International also urges the Board to order a secret ballot vote to determine whether or not the members in Southern Ontario really do wish to be represented by the Steelworkers. RWDSU International indicates that it would be quite content to abide by a vote of the membership on that question because, in its submission, the members have never been properly consulted on that course of action.

39. The applicant union(s) reply that it is not so easy to frame the question(s) to be put to those employees in a representation vote - not least because of the confusion about who now has bargaining rights; moreover, the possibility, or form, of a representation vote is best left to the hearing on the merits, which is to begin on August 9, 1993. A vote at this time would be premature and unnecessarily disruptive.

IV

40. The legal and labour relations problems posed by this case are quite unusual, and seems to involve a mixture of public and private law which the Board has seldom been called upon to consider. The *Labour Relations Act* is primarily concerned about institutional collective bargaining relationships - the trade union in its role as *statutory bargaining agent*. The Statute does not purport to regulate internal union affairs, nor does it prescribe any general code of "democratic practice" (see: *CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498). Indeed, the Statute is exceedingly (and we think intentionally) sparse in respect of such matters, leaving them to be determined, for the most part, in accordance with the union's Constitution. It is the union Constitution which prescribes the rights of members within that organization, eligibility for office, elections, dues levels, property rights and so on; and where the Statute does provide a platform for potential intervention (the duty of fair representation, for example), the Board has been careful not to intrude upon internal union matters not covered by the statutory duty.

41. On the other hand, the "club" or "private-contract model" of trade unionism discussed in *Astgen v. Smith*, *supra*, is not a complete answer either; nor does it fully capture the statutory dimension of trade unionism, or the array of statutory rights and responsibilities exercised by a modern trade union under the *Labour Relations Act*. For the fact is, a trade union is not a voluntary organization like a club or a church, held together by some notional "common-law contract" between the members. Not untypically (as in this case), membership is not a matter of voluntary contract, but is required as a condition of employment by virtue of a collective agreement whose existence and attributes depend primarily, if not entirely, upon the Statute; moreover, the trade union acquires and retains the status of bargaining agent for employees, who become its members, in accordance with that same Statute.

42. In this sense, the union is not a wholly private organization. It receives statutory support in order to facilitate the statutory objectives spelled out in Article 2.1 of the Act and it has a variety of statutory rights and responsibilities. And, of course, bargaining rights do not depend upon the continuing support of the very employees (members or not) who first established the union's status as bargaining agent, nor does the union exercise those bargaining rights solely in respect of its members, nor does the continuation of its exclusive bargaining agency depend solely on the union's Constitutional arrangements.

43. The problems posed in this case involve a mix of public and private law, as well as a mix of private interests and public policy considerations. And they are not easy questions to answer when “private” Constitutional re-arrangement may have statutory or public law consequences.

V

44. However, in this *interim decision*, we do not have to come to any final conclusion about either the Constitutional correctness of the steps the union parties have taken, or the relationship between those steps and the parties’ rights and responsibilities under the *Labour Relations Act*. The above remarks are only intended to describe the nature of the problem. For present purposes, we need only decide, as we do, that there is a legitimate representational dispute between the union parties which must be decided by this Board, and which can only be decided by this Board which has the exclusive jurisdiction to apply the terms of section 63 of the Act to the facts at hand. To put the matter another way: in a statutory regime which depends upon the identification of an exclusive bargaining agent for a defined group of employees, it is the Board which must ultimately determine who that bargaining agent is, when competing unions make that claim; and for present purposes, this panel need only decide whether some *interim order* is desirable pending a resolution of these questions.

45. All of the union parties in this matter point to their history of representing employees in Ontario. All of the union parties assert that the interests of the employees are important and should not be prejudiced while the legal controversy is being decided by the Board. All of the union parties assert that they are ready, willing and able to represent the employees working in the employer’s food stores in Southern Ontario while the case is before the Board. And, no doubt they are. But none of the unions is able to agree on how this can be done, and each asserts that the others will take “political advantage” of any interim arrangement which leaves its partisans in place, with preferred access to the members whose loyalties they seek to win; moreover, in the absence of either an agreement between the unions, or a Board-imposed arrangement, the employer is left to cope with these competing claims on a day-to-day basis in some one hundred food stores, while the employees will be uncertain about whom to turn to if they have an employment problem. That is not a desirable state of affairs from the perspective of either the employer or the employees who, in some sense, are both “third parties” to this controversy between unions. Nor is it congruent with the concept of an *exclusive* bargaining agent, which is an integral part of the statutory scheme, and is designed to avoid problems of this kind.

46. We are not entirely sanguine about intruding into the internal affairs of a trade union; for there is much to be said for Mr. Paliare’s submission that this is an unusual course of action. Nevertheless, we are satisfied that it is in the interests of the employer and the employees that the status quo as at July 10 be maintained until the case before the Board can be completed (i.e. a few weeks). And that is the interim order that we made pursuant to section 92.1 of the Act.

47. The “status quo” that we are preserving is essentially the situation which obtained prior to the events which have now given rise to controversy; and, if we take the RWDSU International at its word, it is also the situation which would have prevailed after October 1, 1993, if the dissenting locals had quietly disaffiliated in accordance with the terms of the merger agreement, with their officers and employees intact. Most important, though, this “status quo” maintains the historical and continuing personal relationship which union representatives had with store managers and with the employees at the stores which they serviced. In our opinion, those are the representatives who are most likely to be familiar with and able to address any employment problems which arise over the next few weeks, and who are best able to deal with the store managers in the locations where such problems arise.

48. In making this interim arrangement, we recognize that partisans left in place may be tempted to exploit their position for political purposes. But that is likely to be the case whichever union is able to put its loyalists into the workplace, with preferred access to the members whose support they seek to win. In the unusual context of this case, it is not very helpful to try to compare the relative harm to the union parties (which in any case seems evenly balanced), and there is little that the Board can do about these union politics, other than to assure employees that it takes no position as between the contending unions. And, of course, as in many political situations, the individuals affected are perfectly capable of assessing the motives and merits of the competing "politicians". Meanwhile, we think it is important that employees be assured of continued representation, if they need it, by persons familiar with the stores in which they work, and it is important that the local store managers know who they may deal with over the next several weeks.

49. In our opinion, the best (albeit imperfect) way to accomplish these latter objectives, to balance the competing interests, on a short-term basis, and to promote harmonious labour relations, industrial stability and effective dispute resolution, is with the interim order set out above.

50. That said, we do not think that it is necessary or desirable at this time to make any other interim order. The Board has no general mandate to settle internal union questions concerning the ownership of union property, the relationship of a union with its own employees, eligibility for office, or the "abuse" of union office under the union Constitution, and so on. We therefore make no direction with respect to any of these matters. To the extent that they are relevant or must be understood to evaluate the behaviour under review, they can be addressed in the course of the proceeding on the merits, which begins before another panel of the Board on August 9, 1993.

0556-93-M Shariar Namvar and Malik Awada, Applicants v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC and Blue Line Taxi Company Ltd., Responding Parties

Duty of Fair Representation - Interim Relief - Remedies - Unfair Labour Practice - Applicant taxi drivers requesting order from Board preventing union from selling three taxi stand spots until complaint alleging breach of union's duty of fair representation decided - Applicants alleging potential harm to third parties if interim order not made - Board noting that harm to third parties would not in itself generally be sufficient to warrant granting interim order - Application dismissed

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *R. M. Sloan* and *E. G. Theobald*.

APPEARANCES: *Bruce Sevigny* for the applicant; *Harry Ghadban*, *Robert McKay* for the Union; and *Ernest Rovet* for Blue Line Taxi Company Ltd.

DECISION OF THE BOARD; August 9, 1993

1. This is an application for an interim order pursuant to section 92.1 of the *Labour Relations Act* (the "Act"). By decision dated May 26, 1993, the application was dismissed. These are our reasons for that ruling.

2. Section 92.1 of the Act reads as follows:

92.1 On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

3. This application for interim relief relates to Board File No. 0555-93-U (the “main proceeding”) an application pursuant to section 91 of the Act in which the applicants, Shariar Namvar and Malik Awada, allege that the responding party, the Retail, Wholesale and Department Store Union, AFL:CIO:CLC (the “union”) has violated section 69 of the Act.

4. In an application for interim relief the Board relies heavily on the written declarations and pleadings filed by the parties. In support of the application, the applicants filed a joint declaration and the union filed a declaration by Harry Ghadban. In addition, in this case the parties were provided with an opportunity to make submissions at a hearing held for this purpose. It was obvious from reviewing the declarations and became even more apparent during the course of the hearing, that some of the facts asserted in the declarations are in dispute between the parties. It is not necessary, for the purposes of this decision, that those matters be resolved.

5. The responding party, Blue Line Taxi Co. Limited (the “employer” or “Blue Line”) was successful in obtaining, through a tender by Transport Canada, the exclusive right to operate taxicabs service at the Ottawa International Airport (the “Airport”), for a period of years commencing October 1, 1992. The union was certified for a bargaining unit of all taxi drivers and taxi owners of Blue Line operating at the airport on November 5, 1992. The union and Blue Line are currently bound to a collective agreement which expires on September 30, 1995.

6. As a condition of the tender contract, Blue Line is now obligated to operate 128 taxi cabs licensed for the airport. Three of these taxi cabs must be designated as accessible taxi cabs equipped to accommodate, for example, people who use wheelchairs. Under previous airport contracts, Blue Line had maintained 125 tax stand spots for its vehicles at the airport. Thus as a result of the new contract and the requirement to operate accessible taxis, three new taxi stand spots were created.

7. The 125 existing airport taxi stand spots are “owned” by dependent contractor employees and these employees enjoy the exclusive right to use these spots. The owners either utilize their spot themselves, or rent the right to its use to other taxi drivers. The spots have a monetary value and can be sold. As three new taxi stand spots were now available and had to be allocated, Blue Line and the union reached an agreement which provided that the union would sell the spots to three drivers. It was agreed that the proceeds from the sale of the spots would be utilized to repay Blue Line for the costs of roof signs, credit card machines and radios with “AWI” boards. The union membership was to make up any short fall or share in any surplus associated with the sale of the spots and the purchase of the equipment. This proposal was included in the collective agreement which was ratified by the membership on March 6, 1993. No details were included concerning how or to whom the spots would be allocated, nor was the price at which the spots were to be sold indicated.

8. The union advised the membership that there were a number of ways in which the spots could be sold. The options included allocating the spots on the basis of seniority, through a lottery, or through sealed bids. At a membership meeting, the options were discussed and debated. A decision was reached to allow all drivers who rented a spot at the airport to participate in a draw or lottery to determine who would have first opportunity to purchase the spots. It was also decided that the spots would be sold for \$70,000.00 each. A lottery was held and the three successful individuals purchased the spots.

9. The applicants are taxi drivers employed by Blue Line and are members of the bargaining unit. They both currently rent a taxi stand spot. The applicant's claim that they are entitled, by virtue of their seniority, to two of the three new spots. As a result of this belief they refused to participate in the lottery and therefore neither of the applicants were successful in obtaining a spot. They claim that the union breached its duty of fair representation due to the manner in which it assigned the new spots.

10. The collective agreement contains the following provisions with regard to seniority:

25:01 The Union will formulate the initial seniority list based on the length of service at the Airport regardless of roof sign. The Company will maintain and update said list and copies will be given to the Union upon request.

25:03 Seniority shall be the principal governing factor for all facets of the Company's business covered directly or indirectly by this agreement.

11. The applicants allege that, historically, "new" spots at the airport were assigned on the basis of seniority to drivers who were renting spots from others. These individuals were never required to pay for the spots. The union disputes this and asserts that there has never been a set formula for the allocation of new spots, other than that these issues were determined by the membership at a meeting. In addition, while the applicants conceded that the spots have some value, they assert that a price of \$70,000.00 is excessive. Once again the union disagrees and feels that the price is appropriate.

12. The applicants requested an order from the Board preventing the union from selling or otherwise dealing with the three accessible taxi spots until the main proceeding was decided on its merits. It is not necessary to set out the submissions of the parties in their entirety. What follows is a brief summary of the submissions of the applicants and the union.

13. Counsel for the applicants referred the Board to *Loeb Highland*, [1993] OLRB Rep. March 197, and suggested that it stood for the proposition that in determining whether or not an interim order was appropriate, the Board took into account whether the main application set out an arguable case and balanced the harm that may occur if the order was granted, versus the harm that may occur if the order was not granted.

14. Counsel argued that the manner in which the union allocated the spaces violated the seniority provisions of the collective agreement and was not consistent with past practice. In failing to recognize the rights of the applicants, the union breached its duty of fair representation. The fact that the method for allocating and the price of the spaces was determined and approved at a membership meeting is no answer in counsel's opinion, as the fact that the surplus funds were to be distributed to the general membership created a conflict of interest. Counsel argued that the manner in which the new spaces were assigned resulted in the majority of the union's membership engaging in predatory practices at the expense of the minority and resulted in the abrogation of the seniority rights of the applicants. As the actions of the union could not be objectively justified, they constituted a violation of the Act. In support of this assertion, counsel referred to *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35. In counsel's opinion, the facts before us support more than an arguable case that the union has breached its duty of fair representation. Counsel also referred the Board to *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067.

15. In support of his assertion that a balancing of the harm involved favoured the granting of an interim order, the applicant's counsel argued that if the union is not prevented from selling the spots the position of the applicants will be greatly prejudiced due to the irrevocable nature of many of the transactions associated with the assignment of the spots. Examples of the transactions

referred to include the making of financing arrangements, the purchasing and licensing of a new vehicle and the obtainment of provincial grants in respect to the vehicle purchases.

16. The union argued that an interim order was not appropriate. Reference was again made to *Loeb Highland, supra*, and the union agreed that the Board in determining whether an interim order was appropriate would consider whether the applicants had made out an arguable case and would balance the harm that may occur if an interim order is granted with the harm that may occur if it is not. The union questioned whether the applicants had made out an arguable case for a breach of the Act. If the Board determined that they had, the union suggested that the applicants had not established that the “balance of harm” dictated an interim remedy should issue. In this case, there was no “chilling effect”, such as could occur in a union organizing drive, to avoid and the passage of time did not operate to the detriment of the applicants. It was not appropriate for the applicant to rely on the potential prejudice which might occur to the individuals who were successful in obtaining the new spots as justification for an interim order. The transactions referred to by the applicants did not involve them, but the three successful individuals. If the applicants were successful in the main application, the fact that the successful individuals might find themselves in a difficult position, is not harm which is suffered by the applicants.

17. The union argued that the granting of an interim order which prevented the union from selling or otherwise dealing with the three taxi stand spots would harm both the company, who was under an immediate obligation to provide accessible taxis to the public and the three successful individuals who had made financial commitments based on their success in the lottery. The union suggested that there is no harm which may be suffered by the applicants which cannot be cured through an order in the final proceedings.

18. The parties are correct when they state that the Board, in determining whether any interim orders are appropriate, has articulated that it will balance what harm may occur if an interim order is not granted, against what harm may occur if it is granted and will consider whether the applicant has made out an arguable case for the remedy requested in the main application. These two factors are not the only factors that the Board may consider, they are merely some of the ingredients in the test for interim relief (see *Morrison's Meat Packers Ltd.*, [1993] OLRB Rep. March 226, where the Board considered a lack of expedition in the filing of an application for interim relief).

19. In determining whether an arguable case has been met the Board in *Loeb Highland, supra*, adopted the following approach:

26. With this in mind, we find it most appropriate to set out as one requirement in a test for interim relief that the main application must reflect an arguable case. By this we mean that if the applicant's assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act. While leaving room for some innovation by parties, such a test protects the integrity of the Board's processes by precluding interim relief where the main application is frivolous or vexatious. This provides the Board with an element of security and some coherence between the main application and the interim relief power, but gives recognition to our other concerns described above.

In the case before us, assuming without deciding that an arguable case has been made out for the relief requested in the main application, we turn now to a review and a balancing of the harm in this case.

20. In *Loeb Highland, supra*, the Board explained the reasons why it felt that a balancing of harm was an appropriate test.

33. The importance of effective remedies, their general imperfection in labour relations, and the corrosive effects of delay all serve to highlight the critical role interim relief has to play in this area. If harm is not easily cured after the fact, and if delay is critical, it makes some sense to emphasize preventing that harm at the earliest possible point. However, it must be recognized that preventing one harm, to a union applicant for example, may well have a harmful labour relations effect on a responding employer. This suggests that a general predisposition towards preventing harm, rather than curing it, applies to the interests of both parties. In other words, the Board must balance the harm to each party in considering whether to grant an interim order. As a result, rather than separating out the concept of irreparable harm which appears to be a poor fit with the Board's experience in remedial matters, and then proceeding to an examination of the balance of convenience, we find it more consonant with labour relations realities to adopt an approach where we consider both what harm may occur if an interim order is not granted, and what harm may occur if it is. This does not mean that the notion of irreparable harm is entirely irrelevant. It merely reduces it to one of a number of aspects of harm which the Board might consider in this area.

34. Of course, this leaves open to some extent the sort of harm we envision as relevant to this balancing process. Given the fact that this jurisprudence is in its infancy, it makes sense to allow the parameters of that harm to evolve in the context of concrete situations which will be presented to us. Suffice it to say at this point that balancing the harm to the parties is not an exercise which takes place in a vacuum, but rather in the context of the purposes and scheme of the Act, which also serve to provide definition for the type of harm we would find persuasive. It is also worth noting that the Board has more flexibility in crafting interim orders than it may in final remedies. Because they are temporary, and because they are not dependent on a finding of a violation, for example, the Board has the relative luxury to conceive of interim justice as an endeavour in problem-solving, rather than fault-finding.

21. We agree with the Board's reasoning in *Loeb Highland, supra*, that it is appropriate to apply a test which balances the harm which may occur if an order is granted against the harm which may occur if the order is not granted. The Board in assessing harm looks primarily at the harm which may be suffered by the parties to the action. Counsel for the applicants states that their position will be greatly prejudiced due to the irretractable nature of many of the transactions associated with the assignment of the spots. Examples of the transactions referred to include the making of financial arrangements, the purchasing and licensing of a new vehicle and obtaining provincial grants in respect to the vehicle purchases. We have difficulty with counsel's assertion. First of all, it was not indicated to us why the applicants feel that these transactions are irretractable and we do not agree that they are. As a result of success in the lottery held by the union, three individuals purchased the right to utilize a taxi stand spot. It was not disputed that this right can be bought and sold. There does not appear to be anything irretractable about the transactions referred to, which are associated with the acquisition of a spot. Secondly, it appears to us that it is not the applicants who could suffer harm if the Board finds a violation of the Act in the main application and orders the union to reverse the allocation of the spaces, but the individuals who currently believe that they own the spots and are proceeding to acquire and license the necessary vehicle on that assumption. Therefore, the applicants are relying solely on harm which could befall individuals who are not a party to this action as justification for the ordering of interim relief. They have not suggested that an interim order is necessary in this case to prevent harm to themselves. In an application for interim relief the Board assesses the potential or actual harm that will be suffered, primarily by the parties to the application. While harm to third parties or the general public may be relevant, it will not by itself generally be sufficient to warrant the granting of an interim order. Finally, we would observe that the potential harm to the individuals who purchased the spots in good faith will be largely financial in nature and can be the subject of a remedy in the main proceeding if appropriate. The Board will not generally order interim relief to avoid or limit harm which is purely financial in nature (see *Morrison's Meat Packers Ltd., supra*, and *Price Club Canada Inc.*, Board File No. 1467-92-U, dated November 5, 1992, as yet unreported). If the potential harm is primarily economic loss, this harm can be the subject of a monetary award in the main action.

22. In support of its argument that an interim order should not be granted the union pointed out that it was necessary to provide accessible taxis pursuant to the tender agreement and if the Board halted the arrangements which had been made the successful individuals would be harmed. The union stressed that the three successful individuals had already started making the necessary arrangements for an accessible vehicle. They had made financial commitments and could not afford to be "in limbo" pending the outcome of the main application. It appears that the union is also relying on potential harm to a third party which could occur if the Board directed interim relief and again it appears that the harm is primarily financial in nature. For the reasons already provided, the Board does not find this argument persuasive.

23. However, as the union pointed out, it is clear that if the Board were to interfere with the allocation of the spots and grant the interim relief requested, the availability of the accessible taxis would be delayed and Blue Line would be in breach of the terms of the tender contract. This could jeopardize their success in future tenders and put them in a difficult position with regard to the current contract. If Blue Line were to lose this contract and the work it provides, harm to the union membership in the form of less available work could occur. Clearly the union has an interest in the ongoing economic viability of the company. Although the harm referred to is partially financial in nature, it could ultimately cause job loss and therefore has the potential to be more than merely economic. This potential harm is relevant to the Board's determination and supports the union's assertion that interim relief is not appropriate.

24. Therefore in balancing the harm which could occur to the parties we concluded that an interim order preventing the union, or anyone else, from dealing with the taxi stand spots was not appropriate. For the reasons set out above, this application for interim relief was accordingly dismissed.

1003-93-R IWA - Canada, Applicant v. Shaw Industries Ltd. c.o.b. as Canusa (a Division of Shaw Industries Ltd.), Responding Party v. Group of Employees, Objectors

Adjournment - Certification - Charter of Rights and Freedoms - Constitutional Law - Evidence - Natural Justice - Practice and Procedure - Representation Vote - Board declining to hear objecting employees' Charter argument where notice not given to Attorney-General - Board declining to adjourn hearing so that notice to Attorney-General could be given - Board applying *Hemlo Gold Mines* case and affirming that 'application date' in section 8(4) of the Act means date on which application is filed and holding that this interpretation involves no denial of natural justice - Board declining to hear employees' *viva voce* evidence in connection with discretion to order representation vote - Board's discretion under section 8(3) of the Act should be exercised in way that recognizes that statutory scheme based primarily on documentary evidence of membership - Proffered evidence would not affect Board's discretion in circumstances of this case

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *W. N. Fraser* and *B. L. Armstrong*.

APPEARANCES: *Rene Brixhe* and *Jim Fyshe* for the applicant; *Brian P. Smeenk*, *Dan Sharkey* and *Carmen Nelson* for the responding party; *C. J. Abbass*, *Norm Waters*, *Alyre Leclerc*, *John Ranger* and *David McGill* for the group of employees.

DECISION OF THE BOARD; August 25, 1993

1. This is an application for certification. The style of cause is hereby amended to reflect the correct name of the responding party: "Shaw Industries Ltd. c.o.b. as Canusa (a Division of Shaw Industries Ltd.)." On the morning of the hearing, the applicant was represented by Mr. Rene Brixhe; in the afternoon it was represented by Mr. Jim Fyshe.

2. Seven copies of the application (as required by Rule 7 of the Board's Rules of Procedure) were delivered to and received by the Board on June 21, 1993 which thus became the application filing date by virtue of Rule 8. On June 21 the Board's Registrar sent notice of the application to the responding party Canusa (also referred to in this decision as "the company"), together with Form B-4, a Notice to Employees of Application for Certification and of Hearing for immediate posting. The Notice indicated that a terminal date had been set for this application of June 28, 1993. On or prior to that date, eleven pieces of correspondence were received from employees of the company. One piece of correspondence from an employee was received subsequent to that date.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

4. Representatives of the applicant (also referred to in this decision as the "union"), the responding party and the employees who had submitted correspondence to the Board (referred to in this decision as "the group of employees") met with a Labour Relations Officer on July 14, 1993. At that meeting, the parties agreed that the following, subject to the disputed positions, constitutes a unit of employees appropriate for collective bargaining:

all employees of Shaw Industries Ltd. c.o.b. as Canusa (a Division of Shaw Industries Ltd.) in the Town of Huntsville, save and except foremen, persons above the rank of foreman, office and sales staff, engineers employed in their professional capacity, students employed in a co-operative training program, students employed during the school vacation period and, pending resolution by the Board, excluding as well Quality Control Inspectors and the Shipper-Expeditor, and Lead-Hand/Foreman.

At that meeting the parties also agreed that a Labour Relations Officer should conduct examinations with respect to the disputed positions. Furthermore, at that meeting the Officer advised the parties that the union's membership evidence disclosed that it had support of more than fifty-five per cent of the employees in the proposed bargaining unit regardless of the final decision on the disputed positions. The union was therefore in a position to receive an interim certificate subject to the issues being raised by the group of employees. Those issues, as outlined in the report from that meeting, which was signed by all the parties, were as follows:

- (1) Timeliness of petitions.
- (2) Charter challenge:
 - (i) no notice to employees
 - (ii) denied both freedom of expression and freedom of association
 - (iii) Board breaching Charter as employees not being treated equally before the law in certification process.
- (3) Right of employees to call evidence for consideration by the board in the exercising of their discretion.

* Objectors will be addressing the Board into their right to inquire into the adequacy of the membership evidence.

A hearing was therefore convened by the Board to address the issues raised by the group of employees.

5. The correspondence submitted by the group of employees was of various types. Some of the notes and letters appear to be revocations of applications for union membership, others indicate concerns with respect to the union organizing drive, specifically that not all persons in potential bargaining unit had been informed of it. Most of the documents indicated a desire not to be unionized. A number of documents indicated a desire that a representation vote be held. One document indicated that the correspondent felt that he or she had been “pressured into signing” and requested that there be a representation vote. All of these documents were initially treated by the Board as “untimely statements of desire” and the Registrar wrote to all the correspondents indicating that the Board was unable to consider their documents in connection with this application.

6. At the beginning of the hearing on July 19 we asked counsel for the group of employees to outline the issues he would be raising. He indicated that he would be arguing that section 8(4) of the *Labour Relations Act* is unconstitutional as it contravenes the *Canadian Charter of Rights and Freedoms* (the “Charter”), and that the Board’s interpretation of the “application date” in that section is incorrect and a denial of natural justice even if it were not found to be unconstitutional. He also advised that he was taking the position that the Board must consider *viva voce* evidence from the employees who had indicated a wish to participate in the proceedings in exercising our discretion as to whether or not to decide to order a vote in these circumstances. Copies of the correspondence from the group of employees with the names removed was provided to the union and the company at the hearing.

7. The first issue considered by the Board was the group of employees’ allegation that section 8(4) of the *Labour Relations Act* contravened sections 2 and 15 of the *Canadian Charter of Rights and Freedoms*. The group of employees failed to notify the Attorneys General of the Province of Ontario and of Canada that it would be bringing this challenge to the legislation, and we heard submissions as to whether we should hear the argument in the absence of such notice. Counsel for the group of employees argued that although he had put his mind to giving such notice, he had decided it was not necessary because in the Board’s recent decision in *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. Mar. 158, the same section of the *Labour Relations Act* had been subject to a challenge under the Charter, the Attorney General had been notified and had not wanted to attend. Counsel for the group of employees indicated that he therefore felt it was not necessary to give the Attorneys General notice in these circumstances. Counsel for the company argued that under the *Courts of Justice Act* notice is not necessary when Charter arguments are made before an administrative tribunal.

8. The Board ruled unanimously that we would not hear the “Charter” argument in the absence of notice to the Attorney General. Whether or not it is strictly necessary under the *Courts of Justice Act* that notice be given before a tribunal can consider such argument, it has been the Board’s practice to require such notice. (See *F.D.V. Construction Limited*, [1986] OLRB Rep. May 617; *Dominion Paving*, [1986] OLRB Rep. July 946; *Arlington Crane Service Limited*, [1987] OLRB Rep. Jan. 7; *Connie Steel Products Limited*, [1987] OLRB Rep. Oct. 1225; *Bay Tower Homes Company Ltd.*, [1988] OLRB Rep. March 259; *Cuddy Chicks Limited*, [1988] OLRB Rep. May 468; *Pinkerton’s of Canada Ltd.*, [1988] OLRB Rep. June 613; *Hemlo Gold Mines Inc.*, *supra*.) Furthermore, counsel for the group of employees acknowledged that he knew that such notice had been given in the past. We note that the Attorney General of Ontario in the *Hemlo Gold Mines Inc.* case, *supra*, did not express disinterest in the issue before the Board as suggested

by counsel for the group of employees; rather, it indicated that it supported the constitutional validity of the impugned legislative provisions, but that it was not possible to intervene in the proceeding on only six days' notice. The Attorney General further indicated in that case that since it did not believe an adjournment of the proceedings was appropriate, it would not participate in that stage of the proceedings. We were unwilling to hear an argument which, if accepted by us, would result in us declaring section 8(4) of the *Labour Relations Act* ineffective, at least in the circumstances of this case and, potentially in other cases, without the Attorney General having been given an opportunity to participate. We therefore did not allow the group of employees to make the Charter argument and, under the circumstances, did not feel it was appropriate to permit an adjournment in order for notice to be given.

9. Subsequent to the completion of the hearing of this matter, the Board received correspondence from counsel for the group of employees advising that he has now provided Notice of Constitutional Question to the Attorneys General of Ontario and Canada. Counsel indicated in this correspondence that he understood that the Board would be reconvening to hear evidence and/or submissions regarding the exercise of the Board's discretion to order a vote in these circumstances. Counsel requested that he be permitted to make his submissions with respect to the *Canadian Charter of Rights and Freedoms* on the next day of the hearing.

10. We are satisfied that it was clear to all participants at the hearing of this matter that the hearing would only be reconvened in the event that we decided that we should hear *viva voce* evidence from the group of employees concerning the content of the documentation they submitted to the Board. The correspondence received from counsel is essentially a request to reconsider our oral ruling of July 12th. Counsel for the group of employees has not provided any reason which would meet the Board's test for reconsideration of our decision with respect to hearing the Charter arguments. The request by the group of employees to reconsider our oral decision of July 12th, is therefore denied.

11. The group of employees then proceeded with the rest of its argument. Counsel argued that the Board's Notice to Employees of Application for Certification and of Hearing is not a notice of application but is only a notice of hearing, and that there is no provision in the Board's Rules as to how notice of application is to be given. Counsel argued that employees were entitled to notice of the application as they are entitled to an opportunity to exercise their democratic right to debate the union's organizing drive and to attempt to persuade those who had signed union cards to change their minds. Counsel argued that the Board's interpretation of "certification application date" in section 8(4) of the *Labour Relations Act* deprives employees of this opportunity and is therefore an incorrect interpretation of that section. Counsel for the group of employees argued that employees must be notified prior to the certification application date that a union organizing drive is in progress. Counsel also argued that it was unfair that, under the Board's interpretation, the determination as to the certification application date is effectively delegated to the union seeking to represent the employees. Counsel argued that the Board should set a certification application date which is different from the date that the application was filed by the union and that we can do so under section 8 of the *Labour Relations Act*.

12. Counsel for the company supported the submissions of the group of employees on this point. The company argued that the principle of *audi alterem partem* ought to apply and that it requires that notice of the application be given in advance so that employees have an opportunity to take steps to protect their right to participate. The company agreed with the group of employees that the Board was misinterpreting section 8(4) of the *Labour Relations Act*.

13. Counsel for the company also argued that the Board's Notice, Form B-4, is flawed in

that paragraph 3 of that Form goes beyond the requirements of section 8(4) of the *Labour Relations Act*, and provides that “the Board will not consider evidence of objection to the union’s certification or evidence of reaffirmation if it is filed or presented after the certification application date”. Counsel stated that section 8(4) does not prohibit the Board from considering “evidence of objection to the union’s certification”. Counsel argued that as a result of its wording, the Board’s Notice to Employees was flawed as it misled employees, and that natural justice required that the Notice should be re-posted with a new certification application date or that a vote should be held.

14. Counsel for the union argued that natural justice required only that notice be given to interested parties of a judicial proceeding and that such notice had been given in this case as required by section 6 of the *Statutory Powers Procedures Act*. Mr. Fyshe noted that there could be no question about the adequacy of the Notice or its language in these circumstances as eleven employees filed correspondence with the Board by the terminal date, retained counsel and appeared at the hearing. He argued that employees were obviously not misled into a belief that they had no right to file any correspondence with the Board.

15. Section 8 of the *Labour Relations Act* provides as follows:

8.-(1) Upon an application for certification, the Board shall ascertain,

- (a) the number of employees in the bargaining unit on the certification application date; and
- (b) the number of those employees who are members of the trade union on that date or who have applied to become members on or before that date.

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

- 1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
- 2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
- 3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

(5) The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and signed by each employee concerned.

(6) The Board may consider evidence of a matter described in paragraph 2 or 3 of subsection (4)

but only for the purpose of deciding whether to make a direction under subsection (3) and only if the evidence is filed or presented on or before the certification application date and is in writing and signed by each employee concerned.

(7) Subsections (4) and (5) do not prevent the Board from,

- (a) considering whether, on or before the certification application date, section 65, 67 or 71 has been contravened or there has been fraud or misrepresentation;
- (b) requiring that evidence of a matter described in paragraph 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned be proven to be a voluntary expression of the wishes of the employee; or
- (c) considering, in relation to evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned, further evidence identifying or substantiating that evidence.

The Board's Form B-4, Notice to Employees of Application for Certification and of Hearing, reads as follows:

File No. 1003-93-R

Form B-4

LABOUR RELATIONS ACT

**NOTICE TO EMPLOYEES OF APPLICATION FOR CERTIFICATION AND OF HEARING
BEFORE THE ONTARIO LABOUR RELATIONS BOARD**

Between:

IWA - Canada,

Applicant,

- and -

Canusa (A Division of Shaw Industries Ltd.),

Responding Party.

TO THE EMPLOYEES OF:

Canusa (A Division of Shaw Industries Ltd.)

1. The applicant, applied on *JUNE 18, 1993* to the Ontario Labour Relations Board for certification as bargaining agent of employees of Canusa (a Division of Shaw Industries Ltd.) in the following unit:

"All employees of Canusa (a Division of Shaw Industries Ltd.) in the Town of Huntsville, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period."

Note: The Board may decide that the appropriate bargaining unit is different from the one proposed by the applicant.

2. The **terminal date** set for this application is *JUNE 28, 1993*.

3. If you wish to participate in these proceedings, you must notify the Registrar in writing by the terminal date, and include your name, address and telephone number and the Board file number. **However, the Board will not consider evidence of objection to the union's certification or evidence of re-affirmation if it is filed or presented after the certification application date.**
4. If you filed evidence of objection or re-affirmation relevant to this application by the application date, you must appear at the hearing in person or by a representative and present evidence that includes testimony from your or their personal knowledge as to the circumstances of the written evidence, including how it was created and the way in which each signature on the document was obtained. The Board may decide an application without considering the evidence of objection or evidence of re-affirmation of any employee who does not appear as required. The Board will not consider oral membership evidence, or oral evidence of objection or re-affirmation, except to identify written evidence filed by the application date in the manner required by the Rules and the *Labour Relations Act*.
5. Other relevant statements, if any:

N/A
6. **A meeting with a Labour Relations Officer will take place** in the Board Offices, 3rd Floor, 400 University Avenue, Toronto, Ontario, on **WEDNESDAY, JULY 14, 1993, at 9:30 A.M. for the purpose of trying to settle all or part of this case if the case is not already settled by that date.**
7. **The hearing of the application will take place** in the "Board Room", 6th Floor, 400 University Avenue, Toronto, Ontario, on **MONDAY, JULY 19, 1993, at 9:30 A.M. if the case is not already settled by that date, and it will continue on consecutive days from Monday to Thursday, excluding Fridays and holidays until completed or as the Board otherwise directs.**
8. **THE PURPOSE OF THE HEARING** is to hear the evidence and representations of the parties with respect to all matters relating to the application referred to in paragraph (1).
9. If you do not attend the Labour Relations Officer meeting or the hearing, the Board may decide the application without further notice to you and without considering any document you may have filed.

DATED July 21, 1993.

T. A. Inniss
Registrar
Ontario Labour Relations Board

NOTE: All communications should be addressed to:

The Registrar
Ontario Labour Relations Board
4th Floor
400 University Avenue
Toronto, Ontario
M7A 1V4
(416) 326-7500

IMPORTANT NOTE

IF YOU DO NOT FILE YOUR RESPONSE AND OTHER REQUIRED DOCUMENTATION IN THE WAY REQUIRED BY THE RULES, THE BOARD MAY NOT PROCESS YOUR RESPONSE AND DOCUMENTS, AND MAY DECIDE THE APPLICATION WITHOUT FUR-

THEIR NOTICE TO YOU. FURTHERMORE, YOU MAY BE DEEMED TO HAVE ACCEPTED ALL THE FACTS STATED IN THE APPLICATION.

THE BOARD'S RULES OF PROCEDURE DESCRIBE HOW A RESPONSE (WHICH INCLUDES AN INTERVENTION) MUST BE FILED WITH THE BOARD, WHAT INFORMATION MUST BE PROVIDED AND THE TIME LIMITS THAT APPLY.

PLEASE CONSULT THE BOARD'S RULES OF PROCEDURE BEFORE COMPLETING YOUR RESPONSE. COPIES OF THE BOARD'S RULES MAY BE OBTAINED FROM THE BOARD'S OFFICE LOCATED ON THE 4TH FLOOR AT 400 UNIVERSITY AVENUE, TORONTO, ONTARIO (TEL. (416) 326-7500).

YOU HAVE THE RIGHT TO COMMUNICATE WITH, AND RECEIVE AVAILABLE SERVICES FROM, THE BOARD IN EITHER ENGLISH OR FRENCH.

PLEASE INDICATE WHETHER YOU WILL REQUIRE ANY SPECIFIC SERVICES, INCLUDING TRANSLATION SERVICES FOR WITNESSES, OR SERVICES FOR PERSONS WHO ARE HEARING OR VISION IMPAIRED OR OTHER SERVICES. THE BOARD WILL ATTEMPT TO ACCOMMODATE YOU, BUT MAY NOT BE ABLE TO MEET YOUR SPECIFIC REQUEST(S).

16. The arguments made by the group of employees and the company with respect to the Board's interpretation of the certification application date in section 8(4) of the *Labour Relations Act* have already been considered and rejected by the Board in *Hemlo Gold Mines Inc.*, *supra*. That decision was upheld by the Divisional Court (Ontario Court (General Division)) in an unreported decision on May 31, 1993 [now reported at [1993] OLRB Rep. May 471]. In the *Hemlo* decision the Board ruled as follows:

23. It is the position of counsel for the intervenors (and counsel for the responding party) that the Board has a discretion to pick the certification application date, and that it should deem that date to be the "terminal date" of February 2, 1993 for purposes of this application. However, we do not find that position to be tenable. When the certification provisions of the amended Act are read as a whole against the background of the pre-1993 Act, and in conjunction with the new Rules, it is clear to us that a fair, large and liberal reading of them (as required by section 10 of the *Interpretation Act*) leads firmly to the conclusion that the certification application date is the date on which the certification application was filed with the Board. If the Board were to construe that phrase to be a reference to a date subsequent to the date on which the application was filed (such as the terminal date set by the Registrar under Rule 28), an employer could be in a position to gerrymander the denominator of the count fraction by hiring, recalling, discharging, or laying off employees. Moreover, to construe the phrase in that manner would be to effectively negate the effect of the aforementioned amendments on petitions and membership evidence, thereby resurrecting the situation which existed prior to January 1, 1993, and subverting the intent of the Legislature.

24. Although section 113(2) of the Act was repealed by Bill 40, the Board is still required to treat certification applications as having been filed on the date they are received by the Board or, if they are mailed to the Board by registered mail, on the date on which they are mailed, by virtue of Rule 8 (as quoted in paragraph 2 of this decision). Reference may also usefully be made in this context to Rule 43 (as quoted in that same paragraph) and to Rule 47, which provides:

Membership evidence, evidence of objection and evidence of re-affirmation will not be considered by the Board unless the evidence is filed by the application filing date, is in writing, signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person.

Those new rules, which parallel and are consistent with section 8 of the Act, confirm by necessary implication that the "certification application date" referred to in section 8 of the Act is one and the same as the "application filing date" referred to in the Rules, i.e., the date on which the

certification application was received by the Board or, if it was mailed to the Board by registered mail, the date on which it was mailed. We find no merit in Ms. Gillespie's contention that those rules derogate from section 8 of the Act and are, therefore, invalid.

25. Accordingly, for purposes of the instant case, the certification application date (and the application filing date) is January 25, 1993, which is the date on which the application was delivered to and received by the Board. There is no merit in the intervenors' contention that "by manipulating procedural rules", the Board has denied employees of the Company a substantive right to participate in the proceedings. Nor is there any merit in their contention that the Board was required by principles of natural justice or fairness to notify employees prior to the certification application date of the right to file a petition or statement of desire on or before that date. Indeed, that would be virtually impossible, as the Board would have no way of knowing of the application until such time as the Board received it. Thus, although we agree with the intervenors' contention that certification affects substantial legal rights of the employer and the employees, and that they are entitled to notice of the certification proceedings in accordance with the rules of natural justice, we are unanimously of the view that proper notice of these proceedings was given in compliance with the rules of natural justice, as codified for purposes of the *Labour Relations Act* by the provisions of the Act and the Rules. In this regard, we are satisfied that nothing turns on the fact that a faxed copy of the notice to employees was initially posted, pending couriered delivery of the actual "green sheets" provided by the Board. Although some of the employees had difficulty understanding the notice, it was clearly sufficient to prompt them to form the aforementioned committee, retain and instruct counsel, and file through counsel an intervention, notice of constitutional question, and the motions and other materials referred to above. Moreover, both the faxed and the original Form B-4 notices contained all of the information required by the notice requirements of the rules of natural justice, the *Statutory Powers Procedure Act*, the *Labour Relations Act*, and the Rules of Procedure.

26. There is also nothing in the Act which requires a trade union to give employees notice of its intention to file a certification application. Although the intervenors submitted in paragraph 21 of their intervention that the Union had an obligation under section 69 of the Act to give employees in the bargaining unit advance notification of the application date, at the hearing of this matter Ms. Gillespie indicated that the intervenors were no longer advancing section 69 as a basis for that obligation (presumably because it is clear from the wording of that provision that the duty imposed by section 69 only applies to a union "entitled to represent employees in a bargaining unit", i.e., a trade union which has bargaining rights for the employees by virtue of having been certified or voluntarily recognized as their bargaining agent). We were not referred to any provision of the Act or applicable legal principle which would require the applicant to give advance notice to the employees (or to the Board) of its intention to file a certification application. Unions frequently organize through contact with some but not all of the employees of an employer. If it is to obtain certification without a representation vote (in the absence of contraventions of the Act making certification appropriate under section 9.2) a union will have to gain the support of over fifty-five per cent of the employees. However, it is under no obligation to contact all of the employees. A union may be unable to contact employees for whom it does not have an address or telephone number, or who are away on vacation or absent due to illness. Moreover, it may choose to intentionally avoid contacting employees who are known to be strongly opposed to unionization, or who are thought likely to notify the employer of any such contact. Employees who are not contacted by the union are treated by the Act (and the Board) as being opposed to unionization (by virtue of being included in the denominator but not in the numerator of the fraction used to determine the count). The same is true of employees contacted by the union who decline to sign a union card. Whether contacted by a union or not, employees opposed to unionization are free to campaign against unionization at any time (with the possible exception of during working hours if their employer has a prohibition against such activities), just as employees who support unionization are free to express their pro-union views at any time (subject to the same limitation, which is implicitly authorized by section 72 of the Act). Whether the expression of such views will be effective depends not only upon the receptiveness of the listeners, but also upon whether any actions taken by the speakers or listeners are taken within the time frames specified in the Act. For example, an employee in a bargaining unit represented by one union is free to attempt to persuade other employees (during non-working hours) to join another union. However, whether joining the other union will enable it to displace the first union at that time depends upon whether it can avail itself of one of the windows of opportunity provided by the "open periods" specified in section 5 of the Act. The same is

true of petitions or statements of desire signed by employees in a bargaining unit who wish to terminate a union's bargaining rights (see section 58 of the Act). Petitions or statements of desire signed by employees who are not represented by a union and who wish to remain unrepresented may be filed with the Board at any time (and, in accordance with Rule 51, will be kept on file by the Board for six months before being returned to the sender or disposed of if no relevant application for certification is filed within that time). However, section 8(4) precludes the Board from considering them unless they are filed on or before the certification application date which, as noted above, is the date on which the certification application is filed with the Board. If this puts employees at somewhat of a disadvantage in comparison with the union by virtue of the fact that it is the union's action of filing a certification application which determines what the certification application date will be, that disadvantage is inherent in the revised legislation and is not something which the Board is empowered to relieve against.

17. We agree with the interpretation of the Board in *Hemlo Gold Mines Inc.*, *supra*. We therefore dismiss the arguments of the group of employees and the company that the certification application date referred to in section 8(4) of the *Labour Relations Act* should be a date other than the date upon which the application was filed by the union. We also reject the arguments that not to so find is a denial of natural justice. We note that that argument was specifically addressed and dismissed by the Court. We also reject the submissions that the union has an obligation to inform all employees of the union organizing drive prior to filing the certification application. An identical argument was also rejected by the Board in *Hemlo Gold Mines Inc.*

18. We also dismiss the company's argument that the Form B-4, Notice to Employees, was inadequate and fatally flawed. While it is true that the Notice does not directly incorporate the language of section 8(4) of the *Labour Relations Act*, it does substantially reflect that section albeit in language which attempts to make it more comprehensible to employees. We note that in this case there does not appear to have been any misapprehension on the part of these employees as to their rights, eleven of whom filed correspondence with the Board prior to the terminal date, retained counsel to come and make representations on their behalf and participated in the meeting with the Labour Relations Officer. We therefore dismiss the request from counsel for the company that the Notice be revised and re-posted or that a vote be held.

19. The group of employees also argued that they have a right to participate and present *viva voce* evidence to the Board which we must consider in determining whether to exercise our discretion to order a vote. The group of employees argued that they had the right to participate and present evidence regardless of our interpretation of section 8(4). Counsel for the group of employees argued that the documents we received from these employees were in themselves requests to participate in the proceeding. It was submitted that the employees wished to testify as to the contents of the correspondence they forwarded to the Board and that the contents of that correspondence was relevant to the exercise of the Board's discretion in determining whether to order a vote in these circumstances.

20. Counsel for the company again supported the arguments of the objecting employees and argued that natural justice required that the group of employees be permitted to testify before the Board with respect to their views on the union. The company argued that evidence which might be pertinent to the Board's exercise of discretion would be evidence with respect to the union's conduct during the collection of membership cards, and that there were statements in the documentation forwarded to the Board suggesting that pressure had been exerted by the union and we should therefore hear the evidence. Counsel also argued that employees who had not been asked to sign cards would not have had any prior opportunity to participate in the union organizing drive and we should therefore hear evidence from them. The company argued further that any requests by employees for a vote was also relevant to the Board's discretion and that we should therefore hear evidence from those requesting a vote.

21. Counsel for the union argued that the correspondence submitted by the group of employees does not on its face indicate a wish to participate in the proceeding and that, in any case, Rules 13 and 14 of the Board's Rules of Procedure outline the requirements of the documentation which must be submitted by someone who wishes to respond to an application. The union noted that those Rules were not complied with in the circumstances. Counsel agreed that the Board had the discretion to consider whether a vote should be ordered, even where the union had filed membership evidence of more than fifty-five per cent of employees in the proposed bargaining unit. The union also agreed that there are circumstances in which the Board would permit the participation of employees and consider their evidence in determining whether to exercise our discretion to order a vote. However, the union argued that in order for us to hear evidence from employees, those employees would have to make allegations which would be relevant to the exercise of our discretion; for example, allegations with respect to fraud or illegal or improper conduct on behalf of the union. If such an allegation were made it was argued, the employees would have to comply with the Board's Rule No. 16. In any case, counsel for the union argued there are no such allegations in the correspondence submitted by this group of employees. The union did not agree that employees had an absolute right to testify before the Board with respect to their views on the union or the appropriateness of ordering a vote. Counsel for the union disputed that the one piece of correspondence which indicated that the writer had felt pressured was an allegation of impropriety, as there was no allegation of unlawful or illegal pressure, and that in any case, if there had been an allegation of impropriety, the employee would have had to comply with the Board's Rules 13, 14 and 16 which read as follows:

13. A person receiving notice of an application who wants to participate in any way in the case, must file a response with the Board by the terminal date, if any. If there is no terminal date, he or she must file the response not later than twelve (12) days after the Registrar sent the notice.

14. Any response filed with the Board must include the following details:

- (a) the full name, address, telephone number and facsimile number (if any) of the responding party, of a contact person for the responding party and of any other person who may be affected by the application;
- (b) a statement of agreement or disagreement with each fact or allegation in the application;
- (c) a statement of the responding party's position with respect to the orders or remedies requested by the other parties;
- (d) where the responding party relies on a version of the facts different from the applicant's, a detailed statement of all material facts on which the responding party relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.

16. Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, and when and where it happened, and the names of any persons said to have acted improperly.

Counsel for the union argued finally that it would not be appropriate to order a vote in this case as there are no allegations that there was any impropriety in the gathering and collection of the membership evidence, and that even if all of the correspondence received from the employees was considered to be revocations, the union still had more than fifty-five per cent support of the employees in the relevant bargaining unit.

22. The Board has the discretion under section 8(3) of the *Labour Relations Act* to order a representation vote even when it is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date. It is also clear that employees may submit documentation indicating their wish to participate in the certification application proceedings on or prior to the terminal date, although the Board shall not consider any of the evidence outlined in section 8(4) of the *Labour Relations Act*. However, the extent of the employees' participation as well as the extent of any other party's is not unlimited. The Board will only hear evidence that is relevant to those issues before it. In these circumstances the Board may limit evidence to matters which would be relevant to the exercise of our discretion to order a vote in the circumstances.

23. Although section 8(3) of the *Labour Relations Act* confers on the Board a discretion to order a representation vote even where the applicant union has demonstrated membership of more than fifty-five per cent, the Act contemplates automatic certification to a union that has demonstrated this level of support except in exceptional circumstances.

24. Generally, once satisfied that the applicant union has more than fifty-five per cent support, the Board will not exercise its discretion to order a vote unless there are compelling reasons to do so and on the basis of cogent evidence. (See *Walbar of Canada Inc.*, [1982] OLRB Rep. Nov. 1734; *Gruyich Services Inc.*, [1986] OLRB Rep. Aug. 1092; *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138; *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB Rep. Feb. 81; *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, and *Shrader Canada Limited*, [1993] OLRB Rep. Mar. 246.) The Board has found in a number of cases that its discretion under section 8(3) should be exercised in a way that recognizes that the statutory scheme is based primarily on documentary evidence of membership. In *P. J. Wallbank Manufacturing Co. Limited*, [1988] OLRB Rep. Mar. 319, at 321, the Board stated:

"In this jurisdiction representation votes remain a residual mechanism resorted to only when the union is unable to establish a "clear majority" (i.e. more than fifty-five per cent), there is some reason to doubt the reliability of the membership evidence as an indicator of employee wishes, or there is some policy reason or special circumstance warranting the additional evidence of a representation vote. The Statute is quite clear that where the union has established the requisite "clear majority", votes are to be the exception, not the rule".

25. In *Gruyich Services Inc.*, *supra*, at 1095, the Board had this to say:

"The scheme of the *Labour Relations Act* makes the documentary evidence filed by a trade union in support of an application for certification the primary basis upon which the wishes of the affected employees are gauged. The Board does not solicit *viva voce* opinions regarding the virtue, or lack of virtue, in union representation. Representation votes are a residual mechanism for use in circumstances where the trade union either cannot demonstrate clear majority support (i.e. more than 55%) or where the circumstances and the particular application call for one".

26. Thus, rather than ensuring majority employee support in every case by requiring a representation vote, the legislation in Ontario (and most jurisdictions in Canada) ensures that there is majority support for the union by certifying without a vote in cases where the union has support of more than fifty-five per cent of the members. Once an applicant union has demonstrated more than fifty-five per cent support in the form of membership documentation, it is only in exceptional circumstances that the Board will exercise its discretion to order a representation vote. This practice generates certainty for all parties involved and ensures that the certification process is as expeditious as possible. At the same time, the integrity of the certification process is protected by allowing the Board some discretion to order a representation vote only in cases where warranted.

27. Requiring compelling reasons before ordering a representation vote is justified by the

fact that the Legislature has set the threshold for automatic certification at more than a simple majority. In *Unlimited Textures Company Limited*, *supra*, at 142, the Board said:

“The Legislature’s choice of membership evidence as the primary basis for the certification decision recognizes the obvious correlation between a desire for trade union representation and the act of joining a trade union. Any uncertainty inherent in equating the two is balanced by striking a confidence level of fifty-five per cent ...”.

28. Over time, the Board has developed a non-exhaustive list of what may be “compelling reasons” to order a vote in circumstances where the union has otherwise filed evidence of sufficient membership support. A vote may be required where one of the following intervening factors arises and calls the evidence into question: build-up or build-down of the bargaining unit (*Cobi Foods Inc.*, [1987] OLRB Rep. June 815; *Simpsons Limited*, [1985] OLRB Rep. May 731); stale membership evidence (*Primo Importing & Distributing Co. Ltd.*, [1981] OLRB Rep. July 953); unreliable membership evidence (*Gruyich Services*, *supra*); intimidation or coercion (*PRC Chemical Corp. of Canada*, [1980] OLRB Rep. Dec. 1805; *St. Michael Shops of Canada Ltd.*, [1979] OLRB Rep. Apr. 346); misrepresentation or fraud (*Carleton University*, [1975] OLRB Rep. Apr. 308; *General Motors of Canada Ltd.*, [1980], OLRB Rep. Oct. 1437).

29. The Board is prepared to accept for the purposes of this decision that the eleven pieces of correspondence received by the Board on or prior to the terminal date represent requests to participate in the certification application proceedings.

30. Mr. Abbass twice confirmed for the Board that the *viva voce* evidence which the group of employees wished to present was contained in the correspondence it filed with the Board. Those who wished to testify that they wanted a vote would, he indicated, advise the Board that they wished a vote, either because they were opposed to unionization or because they believed in the democratic process of a vote. None of the correspondence received by the Board from the employees makes any allegation or raises any issue which the Board might consider a sufficiently compelling reason to order a vote in circumstances where it is satisfied that more than fifty-five per cent of the employees in the bargaining unit have applied to become members of the trade union on or before the application certification date. We do not find that an allegation that an employee felt pressured into signing a union card is an allegation of an impropriety which should compel the Board to hear evidence. Furthermore, if the allegation of pressure was an allegation of union impropriety, the person making the allegation would have had to comply with Rule 16 of the Board’s Rules of Procedure. No impropriety was particularized. Allowing the employees who filed correspondence with the Board to testify with respect to the content of that correspondence would unnecessarily delay the certification application in order to hear evidence which, on the face of the documentation provided, would not affect the Board’s exercise of discretion in these circumstances.

31. The Board does not accept the argument that the amendments to the Act in section 8(4) should result in the Board exercising greater latitude in the evidence which employees may present to it in these circumstances. There is nothing in the amendments to the Act which suggest that the Board’s discretion in ordering a representation vote in circumstances where it is satisfied that more than fifty-five per cent of employees in the bargaining unit are members of the trade union on the certification application date, or have applied to become members on or before that date should be exercised any differently than it has been in the past. On the contrary, the amendments to the Act appear to have been designed to further reduce delay in the certification application process.

32. There was nothing in the representations of the group of employees or in the submis-

sions of the company which would lead the Board to conclude that holding a representation vote would be appropriate in these circumstances.

33. The Board, pursuant to its discretion under section 6(2) of the Act, and having regard to the agreement of the parties, certifies the applicant as the bargaining agent for:

all employees of Shaw Industries Ltd. c.o.b. as Canusa (a Division of Shaw Industries Ltd.) in the Town of Huntsville, save and except foremen, persons above the rank of foreman, office and sales staff, engineers employed in their professional capacity, students employed in a co-operative training program, students employed during the school vacation period and, pending resolution by the Board, excluding as well Quality Control Inspectors and the Shipper-Expeditor, and Lead-Hand/Foreman.

34. The Board hereby directs that a Labour Relations Officer conduct an examination into the duties and responsibilities of the disputed positions.

35. A final certificate must await the resolution of the remaining dispute.

3993-91-U Tim Turner, Applicant v. The Retail, Wholesale Bakery and Confectionary Workers Union, Local 461 of the R.W.D.S.U. AFL:CIO:CLC and Rick Kent, Alf Davis, Gary Sage, Ab Player, Responding Parties v. Weston Bakeries, Intervenor

Damages - Discharge - Duty of Fair Representation - Remedies - Unfair Labour Practice - Board earlier finding union in violation of duty of fair representation, but parties failing to agree on appropriate remedy -Reinstatement with compensation for nine months lost wages ordered - In assessing damages, Board not taking into account two-month delay in complaining to Board, but making deduction for failure to adequately mitigate and for complainant's admitted misconduct prior to discharge

BEFORE: *S. Liang, Vice-Chair.*

APPEARANCES: *Tim Turner* for the applicant; *James Hayes* and *Robert McKay* for the responding parties; *Martin Addario*, *D. Banks* and *D. Graf* for the intervenor.

DECISION OF THE BOARD; August 12, 1993

1. This is a complaint made pursuant to the provisions of section 69 of the *Labour Relations Act*. By decision dated July 24, 1992, I found that the union violated section 69. I directed the parties to meet to attempt to agree on an appropriate remedy. The parties failed to reach agreement and they therefore appeared before me on June 23, 1993 to present evidence and argument with respect to remedy.

2. My essential findings with respect to this complaint are summarized at paragraphs 17 and 18 of the previous decision:

17. The facts of this case are very unusual. What began as a relatively minor incident escalated over the course of several weeks until it resulted in Turner's discharge. It is a troubling case, because it appears that the ultimate conclusion, the discharge, could have been avoided. There

is a striking lack of common sense on the part of all parties involved. Whatever may have been the company's legal rights (and it is not my role to determine whether the company or Turner is right as to their view of the collective agreement's guarantee of union representation), it certainly does not appear that Turner's request for a steward was so unreasonable so as to necessitate the complete stalemate that persisted over three weeks' time. Turner himself acted in a completely puzzling way. He states that he was acting on advice given by the union, and yet over the course of three meetings, with his employment clearly in jeopardy, he fails to seek the advice of the union to determine whether his understanding is in fact correct. Further, even knowing in advance of the second two meetings, he made no attempt to have a union steward attend with him at these meetings. I can only conclude that there is a measure of wilful blindness or recklessness in his conduct.

18. As for the union, I conclude from the evidence that it was aware of what was happening between Turner and the company, and chose not to intervene. There is evidence that Turner made Don Hall aware of the nature of the discussions he was having with the company. Turner filed two separate grievances with union stewards prior to his discharge which must have alerted the union to the nature of the ongoing dispute. Further, there is the letter from the company which urges the union to counsel Turner. On the evidence, I find it more likely than not that had the union intervened prior to the final meeting which resulted in Turner's discharge, the discharge would have been avoided. At the very least, if the union had investigated the circumstances underlying the grievances, it would have found out that Turner was relying on advice which he had obtained from union stewards. If, as is the position the union took later on, Turner was wrong in his understanding of this advice, the union would and should have told him of this prior to the culminating meeting with the company. I find that the union acted arbitrarily in ignoring Turner's situation and failing to advise him of his rights during the course of these events.

3. As is apparent from the above, I found that the union was aware of the events that were unfolding and deliberately chose not to intervene. Their failure to intervene and provide Turner with advice, and their decision to ignore the unfolding situation was arbitrary and in violation of the union's duty of fair representation. I found that the evidence left the distinct impression that all concerned, save Turner, could foresee the eventual discharge and simply allowed it to happen. As stated above, my conclusion was that it was more likely than not that had the union intervened prior to the final meeting which resulted in Turner's discharge, the discharge would have been avoided.

4. As I stated several times in the previous decision, the facts of this case are quite unusual. Among other things, unlike many cases concerning the union's duty of fair representation, the conduct of the union in this case had a direct bearing on the outcome of Turner's employment relationship. It is in this context that I received the parties' evidence and submissions regarding remedy.

5. Turner himself wishes to be reinstated. He also seeks compensation for the period in which he has been out of work. Turner gave evidence with respect to his attempts to find work from the time he was discharged to the present, as well as the delay in bringing this case back to the Board for the hearing on remedy.

6. The company acknowledges that reinstatement is within the Board's powers to grant. However, counsel characterized it as an extraordinary remedy which is not appropriate in most cases brought under section 69 and not appropriate in the present case. Because of the Board's findings that Turner himself acted recklessly and with some wilful blindness in the situation, Turner ought not to be given reinstatement. The company would be prejudiced by a reinstatement order because at the time of the events, it was entitled to rely on its rights under the collective agreement to discharge an employee for just cause, and to impose the specific penalty of discharge on the facts as they existed. Counsel also states that the usual remedial order in a case under section 69, a direction to arbitration, is also not appropriate here. The company urges the Board

instead to award compensation only. The company submits that the union ought to be responsible for compensating Turner, subject to any responsibility that Turner should himself bear. The company supports the position of the union (outlined below) with respect to mitigation, and delay in bringing the dispute over remedy back to the Board for hearing, and their effect on compensation.

7. The union does not oppose the reinstatement of Turner, and states that it is not an inappropriate remedy given the Board's findings. With respect to compensation, Turner ought to bear some responsibility, given that his own actions contributed to his losses. In addition to his conduct during the events leading to his discharge, Turner delayed without any reasonable explanation, for a period of about three months, before filing this complaint. As well, after the Board's decision of June, 1992, Turner did not act diligently in pursuing this matter and many months were lost as the company and the union attempted to obtain his position with respect to the appropriate remedy. The union also submits that the company ought to bear some responsibility for compensation as well, since it was their decision to discharge Turner which led to this complaint.

8. The union submits that Turner has not properly mitigated his losses after his discharge by diligently looking for other employment. The union suggests that reinstatement, with responsibility for compensation apportioned equally amongst the union, Turner, and the company, would most appropriately reflect all of the elements of this case.

9. In response, Turner states that he is willing to accept that he should bear some responsibility for his losses as a result of his own actions prior to his discharge, but submits that one-third is too high a share for him to bear in the circumstances. He also disputes that he has failed to make reasonable efforts to mitigate his damages through looking for other work, and disputes that he has delayed at any stage of these proceedings in having these issues resolved.

10. The Board was referred to *Toronto Hydro Electric System*, [1980] OLRB Rep. Oct. 1561; *The United Steelworkers of America*, [1992] OLRB Rep. July 820; *Re Shaver Hospital and Canadian Union of Public Employees, Local 1742* (1991) 20 L.A.C. (4th), May 122.; *Re Extendicare Ltd. (St. Catharines) and Ontario Nurses' Association* (1981) 3 L.A.C. (3d) Dec. 243; *Re Lily Cups Ltd. and Printing Specialties and Paper Products Union, Local 466* (1981) 3 L.A.C. (3d) Dec. 6.

11. I have carefully reviewed the evidence and submissions of the parties with respect to the issues raised. In the peculiar circumstances of this case, I direct that Turner be reinstated. This remedial order most adequately fulfills the purpose of the Board's remedies for a violation of the Act, which is to place the aggrieved party in the position he or she would have been in but for the violation. Although it is always difficult to be absolutely certain about the course of events which would have unfolded but for a violation of the Act, in this case, I have found that on the balance of probabilities, Turner's discharge could have been avoided.

12. The prejudice to the company by this remedy is no greater than the prejudice which an employer faces in many cases under section 69 where the Board orders a grievance to be referred to arbitration by a union. In those cases, where the remedy is in response to the union's wrongful refusal to refer a matter to arbitration, the company may have long understood the matter to have been settled. Yet, in providing a remedy under section 69, the Board may order the parties to revisit the matter, in order for a complainant to be given the benefit of the grievance and arbitration procedure which had been wrongfully denied. And, where the parties take a grievance to arbitration as a result of an order under section 69, the result of the arbitration may be reinstatement of the grievor, where that is the issue in dispute.

13. In *Toronto Hydro Electric System*, *supra*, the Board ordered the reinstatement of a

complainant in a section 69 case to a standby list. In that case, the complainant was deprived of any future standby overtime work as the result of the union's threat to engage in a work stoppage unless the complainant was removed from this list. Having found that the union's conduct was in violation of section 69, the Board ordered that the complainant be reinstated forthwith to standby duty on the same basis as prior to the events in question. In its decision, the Board stated:

• • •

17. The Board views the union's conduct in this complaint as reprehensible to a degree that necessitates an unequivocal remedial order. The Board's order in any complaint must respond to the special circumstances of the case. This is not, as is common in section 60 complaints, a grievance first arising out of an imputed breach of the collective agreement by the employer followed by a refusal of the union to process the grievance to arbitration. In cases of that kind the Board is reluctant to assess the merits of an employer's conduct in the course of framing a remedial order under section 60 of the Act. The Board generally will not, therefore, dispose of a dispute between employer and employee that is essentially a matter for arbitration. Rather, where the breach of section 60 is grounded in a union's refusal to advance a grievance to arbitration the Board will make an order, with or without procedural conditions, requiring it to do so. (For a review of the Board's rationale for this approach see *Massey-Ferguson Industries Limited* [1979] OLRB Rep. Apr. 216).

18. This is not that kind of complaint. In this case the grievor's rights were initially violated by the union. The grievor's economic loss arose only when the employer acceded to the union's demands. While there were obvious economic reasons for the employer's capitulation, it was the employer's response in the end that allowed the union's conduct to work its result.

19. An employer can, in a number of ways, become a participant in a breach of an employee's rights under section 60 of the Act. In [sic] can become involved by collusion or, as in this case, by becoming the instrumentality by which the unlawful end is achieved. When an employer's actions are an integral part of the conduct that is being complained of under section 60 any order that redresses the breach of the union's duty of representation by returning the parties to the *status quo* that preceded the breach may, of necessity, affect the employer.

14. Counsel for the company suggests that the remedy ordered by the Board in the above case, reinstatement, was contingent on the Board's view of the union's conduct as "reprehensible". Only in such extreme circumstances, it is submitted, ought the Board order reinstatement as a remedy for a violation of section 69.

15. The Board does not read the above-noted case to support the proposition that the remedy awarded for a violation of the Act depends on an assessment of how objectionable the conduct was. To the extent that this is the principle urged on me by counsel, it conflicts with the basic tenet in the Board's decisions that the exercise of its remedial powers under the Act should be compensatory and not punitive in purpose. Remedial relief for conduct which breaches the Act is based upon the loss or harm suffered, not upon how reprehensible the conduct is.

16. As indicated in *Toronto Hydro Electric System*, the Board's remedial order must respond to the special circumstances of a case. In the extraordinary circumstances of this case, and in light of my findings, reinstatement is the remedy which will place Turner in the position he would have been in but for the union's violation of the Act.

17. None of the parties urged the Board to order Turner's discharge grievance to arbitration and I do not find such an order to be appropriate in this case. Although ordering a grievance to arbitration is a common remedy where complaints under section 69 have been upheld, this is because in many cases, the union's unlawful conduct lay in its refusal to take a grievance to arbitration. The "make-whole" remedy is therefore an order reinstating a grievance. In the case before us, such a remedy would be an ill-fit with the facts as I have found them. I have found that the dis-

charge would not have occurred but for the union's unlawful conduct. Therefore, an arbitrator adjudicating on the discharge grievance would be faced with a factual scenario which I have found would not likely have existed but for the union's conduct. In such a context, the real issues underlying these events could not be adequately addressed.

18. With respect to compensation, I do not accept the union's contention that the company ought to bear some of the responsibility for compensating Turner for the period since his discharge to the date of his reinstatement. In *Toronto Hydro Electric System*, the Board ordered the union to compensate the complainant for all his economic losses from the date of his removal from the standby list to the date of his reinstatement. In cases where the Board has ordered that a union take a grievance to arbitration as a remedy under a section 69 complaint, it is not uncommon for the Board to order that if the result of the arbitration is reinstatement with compensation, damages for the period from the date of the union's breach of the Act to the date of the release of the Board decision will be borne by the union.

19. The results in these cases are logically related to the Board's conclusion that but for the union's breach of the Act, the complainant would not have sustained damages during the time it took to bring a complaint under section 69. The complainant's damages during this period were caused by the union's actions.

20. In the case before me, I have also found that the union's unlawful actions caused financial loss to Turner. I have made no findings as to whether the company's actions, independent of the union's actions, were also responsible for this loss during the period in question, and this was not an issue before me. I therefore decline to order the company to share in the damages payable to Turner.

21. With respect to the issue of delay, there was little more than two months between the date that Turner was informed by the union that it would not pursue his discharge grievance, and the date this complaint was filed. Assuming that delay in filing a complaint is relevant to an assessment of damages, I do not consider this delay to be so lengthy that I ought to take it into account. The union also relies on the delay between the date of my decision respecting liability, and the date that the hearing on remedy took place. I am also not inclined to take this period of delay into account, since it was equally within the union's power to request the Board to schedule the hearing on remedy, as it was within Turner's power.

22. Finally, I turn to the issue of mitigation. There is no dispute that Turner has not been able to find any work since his discharge, and that his only income has been from Unemployment Insurance Benefits. Turner gave evidence at the hearing regarding his attempts to find other employment. This evidence was very general, vague and with a few exceptions, he was unable to name any employers whom he had contacted respecting work. Turner was permitted to file with the Board after the conclusion of the hearing, any documents created during his job search, such as letters of application, letters of refusal, and notes. The other parties had the opportunity to review these documents, and have agreed to their admission into evidence. These documents consist of four letters dated from May of 1992 to July of 1992, and two letters dated in June of 1993. In addition, there are undated notations of five telephone contacts. Turner stated at the hearing that he has kept 80-90% of the rejection letters he received, and most of the letters he sent to employers.

23. Turner testified at the hearing that he was restricted in the type of work he could apply for, because of a back injury, and stated that he had a doctor's note to support this restriction during the period in question. This was also filed with the Board after the hearing, and I do not find

that it supports his evidence. I therefore do not find that he was under any restrictions during the period in question which would narrow the range of his job search.

24. In reviewing the evidence regarding Turner's job search, I do not find that he made all reasonable efforts to mitigate his damages. His job search appears on the evidence to have been sporadic, compressed into the summer months, and even then fairly sketchy. However, it is not at all clear, in the present economic climate, that even if Turner had made all reasonable efforts to find other work, he would have found such very quickly. Turner has been out of work for some twenty-one months. I find it appropriate in the circumstances to limit the union's liability for damages to twelve of these twenty-one months.

25. Further, given Turner's agreement at the hearing that he bears some responsibility for his losses as a result of his part in the events leading to his discharge, I also find it appropriate to deduct a further three months from the award of damages.

26. In conclusion, I order:

- a. that Tim Turner be reinstated forthwith to the position he held at the time of his discharge from Weston Bakeries;
- b. that the union compensate Turner for nine months of lost wages.

27. The Board remains seized of this matter in the event of a dispute over the precise amount of the compensation owing or the interpretation or implementation of these orders.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1901-92-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Ottawa Board of Education (Respondent)

Unit: "all employees of The Ottawa Board of Education in the City of Ottawa employed as Speech Language Pathologists, save and except Co-ordinator of Special Education and persons above the rank of Co-ordinator of Special Education, Supervisor-Speech Language Pathology and persons above the rank of Supervisor-Speech Language Pathology, and employees in bargaining units for whom any trade union held bargaining rights as of October 2, 1992" (8 employees in unit)

2797-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Township of Limerick (Respondent)

Unit: "all employees of The Corporation of the Township of Limerick in the Township of Limerick, save and except Clerk Treasurer, persons above the rank of Clerk Treasurer, office and clerical staff and Chief Building Official, By-Law Enforcement Officer and employees working less than 24 hours per week" (3 employees in unit)

2809-92-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Chex Contracting Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Chex Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Chex Contracting Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, and in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (42 employees in unit)

3045-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. MCC Industrial Services Ltd. (Respondent) v. Control Services Group Inc. (Intervener)

Unit: "all employees of Control Services Group Inc. employed in the waste management program at CAMI Automotive Inc. in the Town of Ingersoll, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (22 employees in unit)

3363-92-R: The Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Ingersoll (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of The Corporation of the Town of Ingersoll in the Town of Ingersoll employed in the Parks and Recreation Department, save and except Supervisors, persons above the rank of Supervisor, Secretary to the Director of Parks and Recreation, persons employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

3748-92-R: International Brotherhood of Electrical Workers, and the International Brotherhood of Electrical Workers, Construction Council of Ontario (Applicants) v. Elite Electric Limited (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Elite Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Elite Electric Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0365-93-R: United Steelworkers of America (Applicant) v. Trilea Centres Inc. (Respondent)

Unit: “all security officers of Trilea Centres Inc., in the City of St. Catharines, save and except security supervisor, persons above the rank of security supervisor, office, clerical and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

0387-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Dasa Plumbing Ltd. (Respondent)

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Dasa Plumbing Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Dasa Plumbing Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

0442-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. APCOA Parking Limited (Respondent)

Unit: “all employees of APCOA Parking Limited in the Municipality of Metropolitan Toronto, save and except assistant managers, persons above the rank of assistant manager, office, clerical and sales staff” (66 employees in unit)

0451-93-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Nelsons Laundries Limited (Respondent) v. Group of Employees, Group of Employees (Objectors)

Unit: “all route sales persons (drivers) of Nelsons Laundries Limited in the Regional Municipalities of Hamilton-Wentworth and Waterloo, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

0535-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Utilx Corporation (Respondent)

Unit: “all construction labourers in the employ of Utilx Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Utilx Corporation in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0551-93-R: Canadian Union of Public Employees (Applicant) v. Causeway Work Centre Inc. (Respondent)

Unit: “all employees of Causeway Work Centre Inc. in the City of Ottawa, save and except Executive Director, persons above the rank of Executive Director, Administrator and Program Director” (12 employees in unit) (*Having regard to the agreement of the parties*)

0678-93-R: Ontario Sheet Metal Workers’ & Roofers’ Conference, Sheet Metal Workers’ International Association, Local 397 (Applicants) v. Oakwood Roofing and Sheet Metal Co. Ltd. (Respondent)

Unit: “all roofers and roofers’ apprentices in the employ of Oakwood Roofing and Sheet Metal Co. Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all roofers and roofers’ apprentices in the employ of Oakwood Roofing and Sheet Metal Co. Ltd. in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

0711-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bar-Bro Construction Limited (Respondent)

Unit: “all employees of Bar-Bro Construction Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0725-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: “all employees of Grant Paving & Materials Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, carpenters and carpenters’ apprentices and construction labourers in all sectors of the construction industry in the Townships of Alexandra, Webster, Beniah, Haggart, Kendrey, Colquhoun, Sydere, Bradburn and Calder in the District of Cochrane, excluding the industrial, commercial and institutional sector and excluding any portions of said Townships falling within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit) (*Having regard to the agreement of the parties*)

0756-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: “all employees of the Grant Paving & Materials Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same and employees engaged as surveyors, truck drivers and construction labourers in all sectors of the construction industry in the Townships of Dymond, Harley, Casey, Harris, Bucke, First Brook, Hudson and Kerns excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (21 employees in unit) (*Having regard to the agreement of the parties*)

0767-93-R: United Steelworkers of America (Applicant) v. Adanac Investigation & Security Ltd. (Respondent)

Unit: “all employees of Adanac Investigation & Security Ltd., in the Regional Municipality of Ottawa-Carleton, save and except Mobile Patrol Officers, those above the rank of Mobile Patrol Officer, and office and clerical staff” (90 employees in unit)

0829-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: “all employees of Grant Paving & Materials Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, truck drivers and construction labourers in all sectors of the construction industry in the Town of Kirkland Lake and the geographic Townships adjacent thereto in the District of Temiskaming, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit) (*Having regard to the agreement of the parties*)

0890-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Horne Concrete & Co. (Respondent)

Unit: “all construction labourers in the employ of Horne Concrete & Co., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Horne Concrete & Co., in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

0908-93-R: Ontario Nurses’ Association (Applicant) v. The “Kristus Darzs” Foundation (Respondent)

Unit: “all Registered and Graduate Nurses employed by The “Kristus Darzs” Foundation in the City of Vaughan, save and except the Director of Nursing and persons above the rank of Director of Nursing” (14 employees in unit) (*Having regard to the agreement of the parties*)

0910-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of the Hurley Corporation engaged in cleaning and maintenance at Sun Life Trust, 225 King Street West, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (19 employees in unit) (*Having regard to the agreement of the parties*)

0916-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards employed by Group 4 C.P.S. Limited at Oshawa Foods, 125 The Queensway, in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

0920-93-R: Laundry & Linen Drivers and Industrial Workers Local 847 (Applicant) v. Cichon Enterprises Limited c.o.b. as Imperial Dust Control (Respondent)

Unit: “all Route Sales Agents of Cichon Enterprises Limited c.o.b. as Imperial Dust Control in the Region of Niagara, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff, production employees and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

0928-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards employed by Group 4 C.P.S. Limited at MD Realty, 525 University Avenue, in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

0934-93-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Costa Earthmoving Inc. (Respondent)

Unit: “all construction labourers engaged in the wrecking, demolition, dismantling or salvaging of buildings and structures in the employ of Costa Earthmoving Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers engaged in the wrecking, demolition, dismantling or salvaging of buildings and structures in the employ of Costa Earthmoving Inc.

in all other sectors of the construction industry the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0940-93-R: Service Employees' Union, Local 210 (Applicant) v. Provincial Nursing Home Limited Partnership (Respondent)

Unit: "all employees of Provincial Nursing Home Limited Partnership in the Town of Seaforth regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor and registered nurses" (21 employees in unit) (*Having regard to the agreement of the parties*)

0967-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all Security Guards employed by Burns International Security Services Limited in the City of Brampton, save and except Site Supervisors, Guard Inspectors, persons above the rank of Site Supervisor, Guard Inspector, office, clerical and sales staff, students employed during the school vacation period and persons employed at the Customized Transport site at 265 Rutherford Road South, Brampton" (42 employees in unit) (*Having regard to the agreement of the parties*)

0968-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all Security Guards employed by Burns International Security Services Limited at the Toronto West Professional site of Burns International Security Services Limited, 2425 Bloor Street West, in the Municipality of Metropolitan Toronto, save and except Site Supervisors, Guard Inspectors, persons above the rank of Site Supervisor, Guard Inspector, office, clerical and sales staff, students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

0969-93-R: Retail, Wholesale and Department Store Union (Applicant) v. J & D Flanagan Sales & Distribution Ltd. (Respondent)

Unit: "all employees of J & D Flanagan Sales & Distribution Ltd., in and out of the Regional Municipality of Sudbury and the Districts of Cochrane and Algoma, save and except foreperson and persons above the rank of foreperson, sales, office and clerical staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

0985-93-R: Trom Electric Employees Association (Applicant) v. Trom Electric Co. Ltd. (Respondent)

Unit: "all employees of Trom Electric Co. Ltd., save and except non-working foremen, persons above the rank of non-working foremen and office and clerical staff, in the Province of Ontario" (40 employees in unit) (*Having regard to the agreement of the parties*)

0987-93-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Sunnidale (Respondent)

Unit: "all employees of the Corporation of the Township of Sunnidale in the Township of Sunnidale, save and except Roads Superintendent and persons above the rank of Road Superintendent, office, clerical and library employees" (5 employees in unit) (*Having regard to the agreement of the parties*)

0993-93-R: Ontario English Catholic Teachers' Association (Applicant) v. The Prescott-Russell County English Language Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by The Prescott-Russell County English Catholic Separate School Board in the Counties of Prescott and Russell, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act" (5 employees in unit) (*Having regard to the agreement of the parties*)

1010-93-R: Ontario Public Service Employees Union (Applicant) v. Chatham and District Association for Community Living (Respondent)

Unit: “all employees of the Chatham and District Association for Community Living in the City of Chatham, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (150 employees in unit) (*Having regard to the agreement of the parties*)

1020-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards in the employ of Group 4 C.P.S. Limited, at the Victoria Hospital, in the City of London, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1021-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards employed by Group 4 C.P.S. Limited at General Chemical Canada Inc., Highway #18, in the Town of Amherstburg, save and except Supervisors and persons above the rank of Supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

1027-93-R: Labourers’ International Union of North America Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: “all employees of David Martin Enterprises (London) Limited employed at London Regional Cancer Centre, 790 Commissioners Road East, in the City of London, save and except non-working supervisors, persons above the rank of non-working supervisor, office and sales staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

1033-93-R: The Amalgamated Transit Union, Local 1572 (Applicant) v. Airlift Limousine Service Limited (Respondent)

Unit: “all dependant contractors of Airlift Limousine Service Limited in its limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors, and those above the rank of supervisor” (54 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1035-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario (Applicant) v. Clayman Masonry Ltd. (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Clayman Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of Clayman Masonry Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1036-93-R: United Steelworkers of America (Applicant) v. Adjajo Holdings Inc. (Respondent)

Unit: “all Security Guards of Adjajo Holdings Inc. in the Regional Municipality of Ottawa-Carleton, save and except Supervisors and persons above the rank of Supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

1037-93-R: United Steelworkers of America (Applicant) v. Automatic Cutting Inc. (Respondent)

Unit: “all employees of Automatic Cutting Inc. in the City of Burlington, save and except forepersons, persons above the rank of foreperson, and office and clerical staff” (34 employees in unit) (*Having regard to the agreement of the parties*)

1044-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Landawn Shopping Centres Limited (Respondent)

Unit: “all Security Guards of Landawn Shopping Centres Limited in the Region of Durham, save and except Supervisors and persons above the rank of Supervisor” (5 employees in unit)

1046-93-R: London & District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Roman Catholic Episcopal Corporation Diocese of London in Ontario (Respondent)

Unit: “all office and clerical employees of The Roman Catholic Episcopal Corporation of the Diocese of London in Ontario at 1070 Colborne Street in the City of London, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (6 employees in unit) (*Having regard to the agreement of the parties*)

1048-93-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Duracon Limited (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Duracon Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Duracon Limited in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1063-93-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Sifton Properties Limited (Respondent)

Unit: “all employees of Sifton Properties Limited, at 435 Stone Road, in the City of Guelph, save and except managers and supervisors and persons above the rank of manager and supervisor, office, clerical, sales, engineering and technical staff” (40 employees in unit) (*Having regard to the agreement of the parties*)

1067-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. PC World Canada Ltd. (Respondent)

Unit: “all employees of PC World Canada Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical, sales staff, net list analysts, quality technicians, process engineers, engineering technicians, lab technicians, students employed during the school vacation period and students engaged in a co-operative training program” (220 employees in unit) (*Having regard to the agreement of the parties*)

1068-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all employees of Group 4 C.P.S. Limited, at 800 Bay Street, in the Municipality of Metropolitan Toronto, save and except field supervisors and persons above the rank of field supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

1070-93-R: International Brotherhood of Electrical Workers (Applicant) v. Walkerville Rest Home (Respondent)

Unit: “all employees of Walkerville Rest Home in the City of Windsor, save and except supervisors and persons above the rank of supervisor” (9 employees in unit) (*Having regard to the agreement of the parties*)

1089-93-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Cara Operations Limited (Respondent)

Unit: “all employees of Cara Operations Limited in its Airport Services Division - Flight Kitchen #1, Flight Kitchen #2, Trucking and Commissary - at Lester B. Pearson International Airport, in the City of Mississauga, save and except supervisors, persons above the rank of supervisor and office staff” (750 employees in unit) (*Having regard to the agreement of the parties*)

1090-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all employees of Group 4 C.P.S. Limited at 111 Richmond Street West, 120 Adelaide Street West and 130 Adelaide Street West in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, office and clerical staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

1097-93-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Victoria (Respondent)

Unit: “all office, clerical and technical employees of the Corporation of The County of Victoria in the County of Victoria, save and except Supervisors, persons above the rank of Supervisor, Administrative Secretary - Victoria Manor, Human Resources Assistant and persons in bargaining units for which any trade union held bargaining rights as of June 25, 1993” (108 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1105-93-R: Retail, Wholesale and Department Store Union (Applicant) v. Northmar Distributors, A Division of Silcorp Limited (Respondent)

Unit: “all employees of Northmar Distributors; A Division of Silcorp Limited in and out of the City of North Bay, save and except forepersons, persons above the rank of foreperson, sales, office and clerical staff, and students actually enrolled in a recognized educational institution” (28 employees in unit) (*Having regard to the agreement of the parties*)

1114-93-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses, Pembroke Branch (Respondent)

Unit: “all Registered and Graduate Nursing Assistants employed in a nursing capacity by the Victorian Order of Nurses, Pembroke Branch in the City of Pembroke, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

1123-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: “all employees of Grant Paving & Materials Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and employees engaged as surveyors, construction labourers and truck drivers in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (53 employees in unit)

1125-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Commercial Switchgear Limited (Respondent)

Unit: “all employees of Commercial Switchgear Limited in the City of Vaughan save and except foremen, persons above the rank of foreman, office and clerical staff” (16 employees in unit)

1131-93-R: Teamsters Local Union No. 419 (Applicant) v. Modern Houseware Imports (1987) Inc. (Respondent)

Unit: “all employees of Modern Houseware Imports (1987) Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, and office, sales and clerical staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

1148-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Applicant) v. Urus Industrial Corporation (Respondent)

Unit: “all employees of Urus Industrial Corporation at its Security Information Systems Division in the City of Ottawa, save and except Branch Manager, persons above the rank of Branch Manager, office and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

1149-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in cleaning and maintenance at Waterpark Place, 10 and 20 Bay street, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (37 employees in unit) (*Having regard to the agreement of the parties*)

1168-93-R: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 30 (Applicants) v. Tratim Sheet Metal Inc. (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of Tratim Sheet Metal Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of Tratim Sheet Metal Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1181-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 10 and 20 Guildwood Parkway in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (6 employees in unit) (*Having regard to the agreement of the parties*)

1190-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all employees of Group 4 C.P.S. Limited at 354 Jarvis Street in the Municipality of Metropolitan Toronto, save and except managers and persons above the rank of manager" (14 employees in unit) (*Having regard to the agreement of the parties*)

1191-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all employees of Group 4 C.P.S. Limited at 2111 Finch Avenue West in the Municipality of Metropolitan Toronto, save and except managers and persons above the rank of manager" (6 employees in unit) (*Having regard to the agreement of the parties*)

1204-93-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Trevor Phillips Electric (Respondent)

Unit: "all electricians and electricians apprentices in the employ of Trevor Phillips Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians apprentices in the employ of Trevor Phillips Electric in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1213-93-R: IWA - Canada (Applicant) v. 895414 Ontario Inc. (Respondent)

Unit: "all employees of 895414 Ontario Inc. c.o.b. as Vankleek Hill Heritage Lodge in the Town of Vankleek Hill, save and except administrator, persons above the rank of administrator and office staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

1230-93-R: Service Employees Union, Local 183 (Applicant) v. Fieldcrest Asset Management Ltd. (Respondent)

Unit: "all employees of Fieldcrest Asset Management Ltd. at 95, 97 and 99 Sidney Street in the City of Belleville, save and except managers, persons above the rank of manager, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1234-93-R: Christian Labour Association of Canada (Applicant) v. Community Lifecare Inc. c.o.b. as Chatham Retirement Resort (Respondent)

Unit: "all employees of Community Lifecare Inc. at its Chatham Retirement Resort in the City of Chatham, save and except Supervisors, persons above the rank of Supervisor, Activity Director, Retirement Counselors and paramedical staff" (70 employees in unit) (*Having regard to the agreement of the parties*)

1247-93-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: "all employees of Wackenhut of Canada Limited at 360 and 480 University Avenue in the Municipality of Metropolitan Toronto, save and except managers and persons above the rank of manager" (7 employees in unit) (*Having regard to the agreement of the parties*)

1275-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all employees of Group 4 C.P.S. Limited at 2 Bloor Street East, in the Municipality of Metropolitan Toronto, save and except managers and persons above the rank of manager" (11 employees in unit) (*Having regard to the agreement of the parties*)

1276-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all employees of Group 4 C.P.S. Limited at 393 Millen Road in the City of Stoney Creek, save and except managers and persons above the rank of manager" (13 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0350-93-R; 0351-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Art Gallery of Ontario (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

Unit: "all protection service officers employed by the Art Gallery of Ontario in the Municipality of Metropolitan Toronto, save and except assistant managers and persons above the rank of assistant manager" (57 employees in unit)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	48
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	45
Number of ballots marked in favour of intervener	2
Ballots segregated and not counted	0

0360-93-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Carleton Board of Education (Respondent)

Unit: "all employees of The Carleton Board of Education in the Regional Municipality of Ottawa-Carleton regularly employed in custodial and maintenance and plant operations for not more than 24 hours per week, save and except supervisors of maintenance and operations, forepersons, persons above the rank of foreperson, office and clerical staff, persons employed on a work incentive program by other than the employer, students employed during the school vacation period and employees in bargaining units for whom any trade union held bargaining rights as of May 3, 1993," (158 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	158
Number of persons who cast ballots	32

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	4

0587-93-R: Canadian Union of Public Employees (Applicant) v. Queensway General Hospital (Respondent)

Unit: "all employees of Queensway General Hospital at the City of Etobicoke regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, undergraduate dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer, stationary engineers covered by a subsisting collective agreement, security guards, office and clerical staff" (79 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	106
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	48
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	9

0658-93-R: The Ontario Public School Teachers' Federation (Applicant) v. The Victoria County Board of Education (Respondent)

Unit: "all occasional teachers as defined by section 1(1)31 of the *Education Act* employed by The Victoria County Board of Education in its elementary schools in the County of Victoria, save and except persons who, when they are employed as substitutes for teachers, are teachers as defined by the *School Boards and Teachers Negotiations Act in section 1(m)*" (154 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	173
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	0

0930-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent) v. International Union, United Plant Guard Workers of America, Local 1989 (Intervener)

Unit: "all full-time, part-time, probationary employees, students and temporary employees employed by Ontario Hydro as Nuclear Security Guards, Nuclear Security Specialist(s), Investigation Specialist(s), and Supervising Nuclear Security Guards at the Bruce Nuclear Power Development site" (74 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	60
Number of ballots marked in favour of applicant	58
Number of ballots marked in favour of intervener	2

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0545-93-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Royal City Plymouth Chrysler (1991) Ltd. (Respondent)

Unit: "all employees of Royal City Plymouth Chrysler (1991) Ltd. in the City of Guelph, save and except foremen, persons above the rank of foreman, office and sales staff" (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	6

0802-93-R: Ontario Public Service Employees Union (Applicant) v. Guelph General Hospital (Respondent)

Unit: "all medical laboratory technologist, assistant medical laboratory technologists, all radiology technicians, assistant radiology technicians, all respiratory technology therapists and assistant respiratory technology therapists employed by Guelph General Hospital at Guelph, Ontario regularly employed for not more than 24 hours per week, save and except chief laboratory technologist, chief radiology technician, chief respiratory technology therapist and those above the rank of chief laboratory technologist, chief radiology technician and chief respiratory technology therapist, student technologists, student technicians, student respiratory technology therapists, office and clerical staff, and persons covered by subsisting collective agreements between the hospital and CUPE Local #57 and the Guelph General Hospital Nurse's Association" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	2

Applications for Certification Dismissed Without Vote

3662-91-R: Ontario Public Service Employees Union (Applicant) v. Royal Ottawa Health Care Group/Services de Sante Royal Ottawa (Respondent) v. Group of Employees (Objectors)

0992-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 715241 Ontario Limited (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3655-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. U-Need-A Cab Limited (Respondent)

Unit #1: "all employees of U-Need-A Cab Limited in the City of London, save and except Road Chief Supervisors, persons above the rank of Road Chief Supervisors, Dispatchers, Maintenance Staff, office and clerical staff" (418 employees in unit)

Number of names of persons on revised voters' list	448
Number of persons who cast ballots	344
Number of ballots marked in favour of applicant	74
Number of ballots marked against applicant	169
Number of ballots segregated and not counted	101

Applications for Certification Withdrawn

1753-92-R; 1755-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ferma Construction Company Inc.; Ferma Underground Services Inc.; Malton Construction Ltd.; Ferma Construction Limited; Ferma Concrete & Paving Ltd.; Ferma Concrete Paving (1988) Ltd.; Ferma Group Inc.; and Ferma Crushed Stone Inc. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

0076-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Trilus Corporation and/or Davmark Developments Limited and/or Canemount Holdings Inc. and/or Martap Developments Limited (Respondents)

0570-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

0843-93-R: Ontario Public Service Employees Union (Applicant) v. Meaford-Beaver Valley Community Support Services (Respondent)

0978-93-R: Teamsters Local Union No. 419 (Applicant) v. Brytor International Moving Inc. (Respondent)

0989-93-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Stayner (Respondent)

1018-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

1045-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Evans Investigation & Security Limited (Respondent)

1047-93-R: Labourers' International Union of North America Local 1059 (Applicant) v. Metropolitan Maintenance A Division of 469006 Ont. Inc. (Respondent)

1210-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Evans Investigation and Security Limited (Respondent)

1235-93-R: Hospitality & Service Trades Union Local 261 (Applicant) v. Kelloryn Hotels (Ottawa) Inc. (c.o.b. as Howard Johnsons Hotel) (Respondent)

1272-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Central Chrysler Plymouth (1981) Ltd. (Respondent)

1310-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent)

1370-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Ontario Guard Services Inc. (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3788-92-R: U-Need-A-Cab Limited (Applicant) v. Retail, Wholesale and Department Store Union, AFL:CLC (Respondent) (*Dismissed*)

0128-93-R: Saint-Vincent Hospital (Applicant) v. Independent Canadian Transit Union (Respondent) (*Withdrawn*)

0465-93-R: The Carleton Board of Education (Applicant) v. The Ontario Secondary School Teachers' Federation (Respondent) (*Granted*)

0753-93-R: International Brotherhood of Electrical Workers Local Union Number 138 (Applicant) v. The Hydro-Electric Commission of The City of Hamilton (Respondent) (*Granted*)

0936-93-R: Teamsters Local Union 938 (Applicant) v. Pepsi-Cola Canada Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2901-90-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Armour Window Inc. and Arrow Aluminum Products Limited (Respondents) (*Withdrawn*)

3459-91-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bradsil Limited; Bradsil (1967) Limited; Bradsil (1980) Limited; Bradscot Construction Limited (Respondents) (*Withdrawn*)

3695-91-R: International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. Ripel Painting Inc., Laurentian Painting Limited and 939743 Ontario Inc. c.o.b. as Alpha Painting (Respondents) (*Withdrawn*)

2585-92-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Landmark Contracting Inc. and Landmark Structures (Ontario) Ltd. (Respondents) (*Withdrawn*)

3773-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. S.C. Construction Ltd., Sky Construction (Respondents) (*Withdrawn*)

0097-93-R: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 1 (Applicant) v. Shadeland Masonry Limited, Samlar Homes Inc. (Respondents) (*Withdrawn*)

0291-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Davmark Developments Limited, Martap Developments Limited, Trilus Corporation and Canemount Holdings Inc. (Respondents) (*Withdrawn*)

0368-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Peel Forming Limited and/or 1019139 Ontario Limited (Respondents) (*Granted*)

0693-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. 948255 Ontario Limited, c.o.b. as Simcoe Masonry and Howard Monteith Masonry Ltd. (Respondents) (*Granted*)

0864-93-R: Operative Plasterers and Cement Masons' International Association of the United States and Canada, Local Union 172, Restoration Steeplejacks (Applicant) v. J.O. Dougall Limited and Machinecraft Inc. (Respondents) (*Withdrawn*)

0888-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Highland York Flooring Company Limited and Highland York Interiors Inc. (Respondents) (*Granted*)

0953-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 (Applicant) v. Monmar Developments Limited and Donald Construction Limited (Respondents) (*Granted*)

SALE OF A BUSINESS

2902-90-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Armour Window Inc. and Arrow Aluminum Products Limited (Respondents) (*Withdrawn*)

3695-91-R: International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. Ripel Painting

Inc. Laurentian Painting Limited and 939743 Ontario Inc. c.o.b. as Alpha Painting (Respondents) (*Withdrawn*)

2586-92-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Landmark Contracting Inc. and Landmark Structures Ontario Ltd. (Respondents) (*Withdrawn*)

3749-92-R; 3750-92-R: United Food and Commercial Workers International Union, Local Union 500W (Applicant) v. Myers Transport Limited (Respondent) v. Canadian Brotherhood of Railway, Transport and General Workers (Intervener); United Food and Commercial Workers International Union, Local Union 501W (Applicant) v. Myers Transport Limited (Respondent) v. Canadian Brotherhood of Railway, Transport and General Workers (Intervener) (*Withdrawn*)

3773-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. S.C. Construction Ltd., Sky Construction (Respondents) (*Withdrawn*)

0097-93-R: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 1 (Applicant) v. Shadeland Masonry Limited, Samlar Homes Inc. (Respondents) (*Withdrawn*)

0291-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Davmark Developments Limited, Martap Developments Limited, Trilus Corporation and Canemount Holdings Inc. (Respondents) (*Withdrawn*)

0368-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Peel Forming Limited and/or 1019139 Ontario Limited (Respondents) (*Granted*)

0693-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. 948255 Ontario Limited, c.o.b. as Simcoe Masonry and Howard Monteith Masonry Ltd. (Respondents) (*Granted*)

0724-93-R: MCC Industrial Services Ltd. ("MCC") (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada ("CAW") (Respondent) (*Terminated*)

0864-93-R: Operative Plasterers and Cement Masons' International Association of the United States and Canada, Local Union 172, Restoration Steeplejacks (Applicant) v. J.O. Dougall Limited and Machinecraft Inc. (Respondents) (*Withdrawn*)

0888-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Highland York Flooring Company Limited and Highland York Interiors Inc. (Respondents) (*Granted*)

0953-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 (Applicant) v. Monmar Developments Limited and Donald Construction Limited (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0894-93-R: United Steelworkers of America (Applicant) v. Carleton University (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1343-92-R: Dale Hartwick (Applicant) v. Labourers' International Union of North America, Local 597 (Respondent) v. Morr-Tel Construction (Intervener)

Unit: "all construction employees employed in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Peterborough (except for the geographic Township

of Cavan), the County of Victoria, (except for the geographic Township of Manvers) and the provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	10

3510-92-R: Derek Appleton (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) v. Reliable Bookbinders Limited (Intervener)

Unit: "all employees working on operations under the Jurisdiction of this Agreement (Bindery)" (*Granted*)

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	55
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of respondent	19
Number of ballots marked against respondent	36
Number of ballots segregated and not counted	2

0470-93-R: Eric R. Hutton (Applicant) v. Construction Workers Local No. 52 affiliated with the Christian Labour Association of Canada (Respondent) v. Mirmil Products Limited (Intervener)

Unit: "all its personnel, save and except employees having a supervisory capacity, or having authority to employ, discharge, or discipline employees and office staff" (2 employees in unit) (*Granted*)

Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

0630-93-R: Antonio Bailey (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada), Local 252 (Respondent) v. Carbon Steel Profiles Limited (Intervener)

Unit: "all employees of Carbon Steel Profiles Limited in Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office, technical and sales staff, quality control technicians, persons regularly employed for not more than 24 hours per week and students employed during school vacation periods" (43 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	43
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	33

0681-93-R: Robert M. Huurman (Applicant) v. Industrial and Commercial Workers Union (Respondent) (*Withdrawn*)

0730-93-R: Randy A. Burke (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 127 ("the union") (Respondent) v. Venture Industries Canada, Ltd. ("the company" or "the employer") (Intervener)

Unit: “all regular plant employees at its plant location, Wallaceburg, Ontario, save and except foremen, persons above the rank of foreman, office staff and sales staff, and students employed during the school vacation period” (13 employees in unit) (*Dismissed*)

0770-93-R: Norman Murphy (Applicant) v. Labourers’ International Union of North America, Local 527 (Respondent) v. Larry Dozois (Intervener) (*Withdrawn*)

1126-93-R: Sylvia Rogan (Applicant) v. Canadian Union of Public Employees, Local 1281 (Respondent) v. Association of Part-Time Undergraduate Students (Intervener) (*Withdrawn*)

1169-93-R: Beate Heissler (Applicant) v. The Canadian Union of Public Employees and its Local 1022 (Respondent) v. Hastings County Board of Education (Intervener) (*Withdrawn*)

1274-93-R: Natural Resource Gas Limited (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) (*Granted*)

1375-93-R: Crane Canada Inc. (Applicant) v. Labourers’ International Union of North America Local 247 (Respondent) (*Granted*)

REFERRAL FROM MINISTER (SECTION 109)

2590-92-M: Canadian Guards Association (Applicant) v. Pinkerton’s of Canada Limited (Respondent) (*Terminated*)

0845-93-M: Amalgamated Transit Union Local 616 (Applicant) v. Transit Windsor (Respondent) (*Granted*)

0846-93-M: Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Applicant) v. The Citadel Inn Ottawa (Respondent) (*Terminated*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1256-93-U: E.B. Eddy Forest Products Ltd. (Applicant) v. Communications, Energy and Paperworkers Union of Canada, CLC/CTC, Wm. H. Burnell, Local 74, Michael Gauthier, Clive Fitzjohn, Wayne Barnes, Michael Blais, Joseph Charette, Robert Coyne, Matti Haapamaki, Peter Hunda, Grant Richer, Brian Wikiruk (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2369-89-U: Douglas Dorling (Applicant) v. Ontario Public Service Staff Union (Ms. Sherry Currie) (Respondent) v. Ontario Public Service Employees Union (James Clancy) (Intervener) (*Withdrawn*)

2903-90-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Armour Window Inc., Arrow Aluminum Products Limited (Respondents) (*Withdrawn*)

2327-91-U: United Brotherhood of Carpenters and Joiners of America, Local 18 and Elwood Gallant (Applicants) v. S.G.B. 2000 Inc. (Respondent) (*Granted*)

3913-91-U: Michael A. Rankin (Applicant) v. Local 721 of the Bridge, Structural and Ornamental Ironworkers of America (Respondent) (*Granted*)

1812-92-U: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. General Wood Products (Respondent) (*Granted*)

2920-92-U: Graphic Communications International Union, Local 500M (Applicant) v. Reliable Bookbinders

Limited (Respondent) v. The Attorney General of Ontario and the Attorney General of Canada (Interveners) v. Group of Employees (Interested Party) (*Dismissed*)

3077-92-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. U-Need-A-Cab Limited and Thomas J. Reardon (Respondent) (*Withdrawn*)

3103-92-U: Lloyd W. MacLean (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Respondent) v. Ontario Hydro, The Electrical Power Systems Construction Association (Interveners) (*Dismissed*)

3248-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. U-Need-A-Cab Limited and Thomas J. Reardon (Respondents) (*Withdrawn*)

3397-92-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Peacock Lumber Ltd. (Respondent) (*Dismissed*)

3566-92-U: Surjeet Singh Chhokar (Applicant) v. G.M. Caterair International Toronto Shoppe and H.E.R.E. Local 75 (Respondents) (*Dismissed*)

3719-92-U: Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. St. Joseph's General Hospital and Linda James (Respondents) (*Withdrawn*)

3725-92-U: Susan J. Lawrence (Applicant) v. York University Staff Association (Respondent) (*Dismissed*)

0027-93-U: The Almonte Nursing Home (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

0132-93-U: Retail, Wholesale and Department Store Union (Applicant) v. Weston Bakeries Limited (Respondent) (*Withdrawn*)

0186-93-U: Raymond J. Balsillie (Applicant) v. Ontario Hydro, Canadian Union of Public Employees Local 1000 (Respondents) (*Dismissed*)

0199-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. U-Need-A-Cab Limited (Respondent) (*Withdrawn*)

0241-93-U: Remi Belanger (Applicant) v. Court Industries Co. Limited and Local 268, International Association of Machinists and Aerospace Workers (Respondents) (*Withdrawn*)

0322-93-U: Linda Quibell (Applicant) v. United Steelworkers of America, Local 5815 (Respondent) (*Withdrawn*)

0429-93-U; 0430-93-U; 0431-93-U: Canadian Union of Public Employees, Local 1023, Service Full Time Bargaining Unit (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent) v. The Ontario Public Service Employees Union (Intervener); Canadian Union of Public Employees, Local 1023, Service Part Time Bargaining Unit (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent) v. The Ontario Public Service Employees Union (Intervener); Canadian Union of Public Employees, Local 1023, Clerical Full Time Bargaining Unit (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent) v. The Ontario Public Service Employees Union (Intervener) (*Withdrawn*)

0583-93-U: United Food and Commercial Workers' International Union, Local 1000A (Applicant) v. Sobeys Inc. (Respondent) (*Dismissed*)

0604-93-U: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Roxson Contractors Limited and Roxson Contractors (1991) Limited (Respondent) (*Granted*)

0606-93-U: Service Employees' Union, Local 210 (Applicant) v. Malcolm Manor Retirement Home (Respondent) (*Withdrawn*)

0611-93-U: Toronto Greenpeace Staff Association (Applicant) v. Greenpeace Canada, and Greenpeace International (also known as Stichting Greenpeace Council) (Respondents) (*Withdrawn*)

0650-93-U: Roma R. Rees, Velma DiFrancesco, Sheila Rodger (Applicants) v. The Association of Allied Health Professionals: Ontario (Respondent) (*Withdrawn*)

0771-93-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Light-Mar Electrical Contractors Ltd. (Respondent) (*Withdrawn*)

0772-93-U: Public Service Alliance of Canada (Applicant) v. James Bay General Hospital (Respondent) (*Withdrawn*)

0793-93-U: Carol S. Martineau (Applicant) v. Labourers' International Union of North America, Local 527 and Marine-Banister (A Joint Venture) (Respondents) (*Withdrawn*)

0796-93-U: Lynn Campbell (Applicant) v. Canadian Union of Public Employees (Respondent) v. Centenary Health Centre (Intervener) (*Withdrawn*)

0889-93-U; 1058-93-U: Douglas Laschelle (Applicant) v. Communications, Energy and Paperworkers Union of Canada and Brian Card (Respondent) (*Withdrawn*)

0906-93-U: Hospitality & Service Trades Union Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Withdrawn*)

0907-93-U: Edward Gibson (Applicant) v. Canadian Union of Public Employees Local 794 (Respondent) (*Withdrawn*)

0929-93-U: Winston Robinson (Applicant) v. Canadian Union of Public Employees Local 2816 (Respondent) v. The Hospital For Sick Children (Intervener) (*Withdrawn*)

0941-93-U: Canadian Union of Public Employees (Applicant) v. Causeway Work Centre Inc. (Respondent) (*Withdrawn*)

1006-93-U: Ronald Murduff (Applicant) v. Retail, Wholesale and Department Store Union (Respondent) (*Dismissed*)

1009-93-U: Brian Egan (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) Local 222 and General Motors of Canada Limited (Respondents) (*Withdrawn*)

1031-93-U: Construction Workers Local 53, CLAC (Applicant) v. Pietro Electric Limited (Respondent) (*Withdrawn*)

1082-93-U: Robert L. Petten (Applicant) v. Gray Coach Lines and Amalgamated Transit Union Local 1630 represented by Union President Mr. Gerald Clayson (Respondents) (*Withdrawn*)

1085-93-U: Valentino Sesti (Applicant) v. Local 1 Bricklayers, Masons Independent Union of Canada (Respondent) (*Withdrawn*)

1087-93-U: Service Employees Union, Local 183 (Applicant) v. Westgate Lodge (Respondent) (*Withdrawn*)

1101-93-U: Larry D. Sheard (Applicant) v. Waste Management (Respondent) (*Withdrawn*)

1104-93-U: Hospitality & Service Trades Union Local 261 (Applicant) v. United Food and Commercial Work-

ers Union Local 206, Kelloryn Hotels Inc. (c.o.b. as Howard Johnson Hotel Ottawa), Accommodex Ltd. (Respondents) (*Withdrawn*)

1106-93-U: Southern Ontario Newspaper Guild (Applicant) v. Metroland Printing, Publishing and Distributing Ltd., John Devine (Respondents) (*Withdrawn*)

1121-93-U: Bakery, Confectionery and Tobacco Workers International Union, Local 264 (Applicant) v. Hamilton Baking Company (1988) Limited (Respondent) (*Withdrawn*)

1129-93-U: Marie E. Martin (Applicant) v. Golden Plough Lodge (Respondent) (*Dismissed*)

1130-93-U: Phan Hoa (Applicant) v. Local Union 9236 & Walbar Canada Inc. (Respondents) (*Withdrawn*)

1186-93-U: Labourers' International Union of North America, Local 1059 (Applicant) v. 469006 Ontario Inc. (Metropolitan Maintenance), Paul Roper, Steven Mathew, Henry McDonald (Respondent) (*Withdrawn*)

1198-93-U: Labourers International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning (Respondent) (*Withdrawn*)

1225-93-U: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning (Respondent) (*Withdrawn*)

1242-93-U: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Labourers' International Union of North America, Local 527 and its officers Andre Roy President, Rheel Cote Vice-President, Adriano Rossi Representative (Respondent) (*Withdrawn*)

1278-93-U: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Trevor Phillips Electric and Intech Electrical Services Ltd. (Respondents) (*Granted*)

1309-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent) (*Withdrawn*)

1313-93-U: Lorenzo Scalfari (Applicant) v. York University (Respondent) (*Withdrawn*)

1318-93-U: Brian Smith (Applicant) v. Collingwood Local Union - 834 Rubberworkers Collingwood Good-year Hose Plant (Respondents) (*Withdrawn*)

1343-93-U: Retail, Wholesale & Department Store Union (Applicant) v. J & D Flanagan Sales & Distribution Ltd. (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

0893-93-M; 0983-93-M: Toronto Greenpeace Staff Association (Applicant) v. Greenpeace Canada and Greenpeace International (also known as Stichting Greenspace Council) (Respondents) (*Withdrawn*)

1119-93-M: United Food and Commercial Workers Union, Local 175/633 (Applicant) v. 988421 Ontario Inc. c.o.b. as East Side Mario's (Respondent) (*Granted*)

1183-93-M: Bryan Forde (Applicant) v. National Association of Broadcast Employees & Technicians, Local 700 (Respondent) (*Withdrawn*)

1199-93-M: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning (Respondent) (*Withdrawn*)

1277-93-M: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Trevor Phillips Electric and Intech Electrical Services Ltd. (Respondents) (*Granted*)

1308-93-M: International Union of Operating Engineers, Local 793 (Applicant) v. Browning-Ferris Industries Ltd. (Respondent) (*Withdrawn*)

1335-93-M: Bryan Forde (Applicant) v. National Association of Broadcast Employees & Technicians, Local 700 (Respondent) (*Dismissed*)

1342-93-M: Retail, Wholesale & Department Store Union (Applicant) v. J & D Flanagan Sales & Distribution Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1022-93-M: Libbey Glass Inc., Libbey Canada Inc. (Employers) v. Aluminum, Brick and Glass Workers' International Union (AFL-CIO-CLC) and its Local 235-G (Trade Union) (*Granted*)

1023-93-M: Libbey Glass Inc., Libbey Canada Inc. (Employer) v. Aluminum, Brick and Glass Workers' International Union (AFL-CIO-CLC) and its Local 246-G Office Unit (Trade Union) (*Granted*)

1094-93-M: Libbey Glass Inc., Libbey Canada Inc. (Employers) v. The Canadian Union of Operating Engineers and General Workers - Local 100 (Trade Union) (*Granted*)

1111-93-M: Fleet Industries, a Fleet Aerospace Company (Employer) v. International Association of Machinists and Aerospace Workers, Riverside Lodge 939 (Trade Union) (*Granted*)

1146-93-M: Laidlaw Waste Systems Ltd. (Employer) v. International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (Trade Union) (*Granted*)

1180-93-M: Fleet Industries, a Fleet Aerospace Company (Employer) v. International Association of Machinists and Aerospace Workers, Frontier Lodge 171 (Trade Union) (*Granted*)

TRUSTEESHIP

0499-92-T: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union 834, Toronto, Ontario (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2585-89-JD: Duron Ontario Ltd. (Applicant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Labourer's International Union of North America, Local 506, Foundation Company of Canada Limited (Respondents) (*Withdrawn*)

0815-92-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, on its own behalf and on behalf of its Local 128 (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of its Local Union 46, Electrical Power Systems Construction Association and Babcock & Wilcox Canada (Respondents) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0696-93-OH: William C. Wood (Applicant) v. Lasta Building Restoration Ltd. (Respondent) (*Withdrawn*)

0755-93-OH: Tracey Davidson (Applicant) v. Artcraft Jewellery, Division of Artcraft Limited (Respondent) (*Withdrawn*)

0995-93-OH: Chris Walker (Applicant) v. Steep Rock Resources Inc. (Respondent) v. Teamsters Local Union 91 (Intervener) (*Dismissed*)

1060-93-OH: Mr. Bruce McGuffie (Applicant) v. Toronto Transit Commission (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2029-91-G: Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ellis-Don Limited (Respondent) (*Granted*)

2326-91-G: United Brotherhood of Carpenters and Joiners of America, Local 18 and Elwood Gallant (Applicant) v. S.G.B. 2000 Inc. (Respondent) (*Dismissed*)

2989-91-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. State Contractors Limited (Respondent) v. International Association of Bridge, Structural and Ornamental Iron Workers - Local Union No. 700 (Intervener) (*Dismissed*)

3981-91-G: Ontario Sheet Metal Workers and Roofers Conference Sheet Metal Workers International Association Local 473 (Applicants) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

0021-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 1946 (Applicant) v. Ellis-Don Construction Limited (Respondent) (*Withdrawn*)

2069-92-G: Ontario Allied Construction Trades Council, Labourers' International Union of North America and Labourers' International Union of North America, Local 506 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

2587-92-G; 2588-92-G; 0235-93-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Landmark Structures Ontario Ltd. (Respondent); United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Landmark Contracting Inc. (Respondent); United Brotherhood of Carpenters and Joiners of America Local 18 (Applicant) v. Landmark Contracting Ltd., Landmark Structures Ontario Ltd. (Respondents) (*Withdrawn*)

2812-92-G; 2813-92-G; 2814-92-G; 2815-92-G; 2816-92-G: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

3772-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. S.C. Construction Ltd., Sky Construction (Respondents) (*Withdrawn*)

0003-93-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Bascelli Construction Inc. (Respondent) (*Granted*)

0095-93-G; 0096-93-G: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 1 (Applicant) v. Samlar Construction (Respondent); The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 1 (Applicant) v. Shadeland Masonry Limited (Respondent) (*Withdrawn*)

0144-93-G: Ontario Allied Construction Trades Council and Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America and The United Brotherhood of Carpenters and Joiners of America (Applicants) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Granted*)

0187-93-G: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. D. Lafreniere Builders Ltd. (Respondent) (*Withdrawn*)

0369-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Peel Forming Limited and/or 1019139 Ontario Limited (Respondents) (*Granted*)

0540-93-G: Labourers' International Union of North America, Local 837 (Applicant) v. Sunset Sewers Contracting Ltd. (Respondent) (*Granted*)

0593-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. New Generation Drywall (Respondent) (*Granted*)

0629-93-G: International Brotherhood of Painters & Allied Trades Local 1795 Glaziers (Applicant) v. Emery Glass & Aluminum Limited (Respondent) (*Granted*)

0694-93-G: Labourers' International Union of North America, Local 506 (Applicant) v. Howard Monteith Masonry Ltd. (Respondent) (*Granted*)

0746-93-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. City Acoustics Limited (Respondent) (*Granted*)

0751-93-G: Ontario Provincial Conference of the International Union Bricklayers and Allied Craftsmen - Local 4 Ontario, St. Catharines (Applicant) v. Foundex Masonry Ltd. a.k.a. J. Bluemeke Masonry Ltd. (Respondent) (*Withdrawn*)

0937-93-G; 0938-93-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. J & T Caulking & Sealing Corp. (Respondent) (*Withdrawn*)

0954-93-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 (Applicant) v. Donald Construction Limited (Respondent) (*Withdrawn*)

0997-93-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Dominion Masonry Systems Inc. (Respondent) (*Withdrawn*)

1013-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pine Ridge Construction (1986) Ltd. (Respondent) (*Withdrawn*)

1030-93-G: Construction Workers Local 53, CLAC (Applicant) v. Pietro Electric Limited (Respondent) (*Withdrawn*)

1040-93-G: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Joshua Tree Construction Ltd. (Respondent) (*Granted*)

1054-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. D.S. Construction Co. (Respondent) (*Withdrawn*)

1059-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Raf-Tar Construction Inc. and Tri-Gar Construction Inc. (Respondents) (*Withdrawn*)

1076-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Highland York Interiors Inc. (Respondent) (*Granted*)

1077-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Highland York Flooring Company Limited (Respondent) (*Withdrawn*)

1078-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. U-Flooric Contracting (Respondent) (*Dismissed*)

1079-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. U-Flooric Contracting (Respondent) (*Withdrawn*)

1098-93-G: Labourers' International Union of North America, Local 506 (Applicant) v. Begg and Daigle Limited (Respondent) (*Granted*)

1109-93-G: United Brotherhood of Carpenters and Joiners of America - Local 18 (Applicant) v. Kayal Construction Co. (845288 Ont. Ltd.) (Respondent) (*Granted*)

1118-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Art Magic Carpentry Limited (Respondent) (*Granted*)

1127-93-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. National Painting & Decorating Corporation (Respondent) (*Granted*)

1132-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. S & D Equipment Rental Ltd. (Respondent) (*Granted*)

1134-93-G; 1135-93-G: Drywall Acoustic Lathing & Insulation Local 675 (Applicant) v. Ekko Interior Systems (Respondent) (*Granted*)

1144-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 (Applicant) v. Sarnia Wolverine Manufacturing Ltd. (Respondent) (*Withdrawn*)

1159-93-G: International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. Armor Masonry & Precast Ltd. (Respondent) (*Granted*)

1161-93-G: International Union of Bricklayers and Allied Craftsmen, Local 8 (Applicant) v. Bradsil (1967) Ltd. (Respondent) (*Granted*)

1165-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Main Mechanical Ltd. and The Metropolitan Plumbing & Heating Contractors Association (Respondents) (*Granted*)

1167-93-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Bluebird Construction Inc. (Respondent) (*Withdrawn*)

1172-93-G: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Barné Builders Limited (Respondent) (*Granted*)

1176-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. T. Romano Tile and Marble Ltd. (Respondent) (*Withdrawn*)

1177-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Duron Ottawa Ltd. (Respondent) (*Granted*)

1202-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Condor Crane Service Inc. (Respondent) (*Granted*)

1209-93-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Mark O'Connor Excavating Ltd. (Respondent) (*Granted*)

1214-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Premier Cable Construction (Respondent) (*Withdrawn*)

1222-93-G: Labourers' International Union of North America Local 837 (Applicant) v. Valee-Way General Contracting (Respondent) (*Withdrawn*)

1224-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Gulf Lathing and Drywall Co. (Respondent) (*Withdrawn*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

September 1993



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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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EDITOR: RON LEBI

Selected decisions of particular reference value are
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2867-92-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto, Applicant v. **Ainsworth Electric Co. Limited** and Stadium Corporation of Ontario Limited, Respondents.

Bargaining Rights - Related Employer - Union applying for declaration that staging services company (company A) and company owning Dome stadium (company B) are related employers - Union seeking to bind B to union's collective agreement with A with view to having certain stage hand work sometimes undertaken by B's employees done by unionized employees - Board describing relationship between A and B as that of owner/sub-contractor, not a joint venture - Board concluding that commercial and labour relations situation not revealing "mischief" which section 1(4) of the Act was designed to cure - Union not seeking to protect bargaining rights with A, but rather to expand those rights to customer of A - Application dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members G. O. Shamanski and R. R. Montague.

APPEARANCES: Thomas W. G. Pratt and James C. Fuller for the applicant; Scott G. Thompson, Melanie Sopinka, Brian Eaton and Tim Prior for Ainsworth Electric; Edward T. McDermott, J. Hulton, L. Dale and B. Hunter for Stadium Corporation.

DECISION OF THE BOARD; September 1, 1993

I

1. This is an application under section 1(4) of the *Labour Relations Act*. That section reads as follows:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

2. The union urges the Board to declare that Ainsworth Electric Co. Limited ("Ainsworth") and the Stadium Corporation of Ontario Limited ("Stadco") are one employer for the purposes of the *Labour Relations Act*. The union seeks this declaration in order to bind Stadco to the union's collective agreement with Ainsworth. The union's objective is to have certain "stage hand work" that is sometimes undertaken by Stadco employees done by employees whom the union represents.

3. The union has never sought to organize, and does not now represent any of the employees of Stadco. Indeed, for reasons which will be mentioned below, it is not at all clear that a certification application could be made, because Stadco may be a Crown agency to which the *Labour Relations Act* does not apply. However, the parties have agreed that we may set aside this jurisdictional argument, for the time being, and deal with it later only if necessary; for it is the respondents' primary submission that the commercial situation is not one which triggers the application of section 1(4) in any event.

4. The commercial facts are not substantially in dispute.

II

5. Stadco's business is the operation and maintenance of a multi-purpose stadium located in the City of Toronto and popularly known as "the Dome". The sole shareholder of Stadco is the Crown in Right of Ontario, as represented by the Treasurer of Ontario and the Minister of Economics.

6. Stadco is governed by a Board of Directors, the members of which are selected by the Minister of Economics, subject to the prior approval of the Provincial Executive Counsel. The Board of Directors (with the approval of the Minister) appoints a Chief Executive Officer. The remaining officers and employees of Stadco are hired by Stadco itself. Stadco has no authority to acquire any interest in any other corporation, nor may it incorporate any subsidiary without the express prior approval of the Minister and Management Board of Cabinet.

7. Ainsworth has no direct or indirect ownership or control of Stadco. Ainsworth owns no shares or other equitable interest in Stadco. Stadco and Ainsworth have no common directors, officers, or principles.

8. As part of its business functions, Stadco leases the Dome premises to "outside" tenants or promoters, who use the Dome for sporting, musical or other public events. Stadco also produces its own events, and co-produces events jointly with other promoters, using outside suppliers or its own employees as it deems necessary. When Stadco is not directly involved in the production of an event, it nevertheless "co-ordinates" the needs of other promoters with the suppliers of diverse products and services that may be needed by those promoters and can be obtained from third party businesses.

9. Stadco maintains and operates the Dome Stadium through its own complement of managerial and non-supervisory staff. Stadco employs approximately one hundred and thirty employees. Among these are its own security and maintenance staff, including at least one electrician and one plumber/mechanic - although there is no indication that the trades group is limited to these numbers.

10. For its "own" events, Stadco sometimes uses its own "staff", electrical and mechanical standby labour, and its own electrical stage standby labour. Stadco also uses its own "stagehands" (or more exactly workers who do stagehand work) - hence the present application in which IATSE claims that such work should be done by its members.

11. Stadco is not now, and never has been, in the business of providing electrical and mechanical services or staging systems to other outside building owners or managers. Stadco's business activities are confined to the Dome.

12. By contrast, Ainsworth is a privately owned diverse electrical, mechanical, and staging services company, that has been in business for over fifty years. Ainsworth operates across Canada, through various divisions. It has a labour force that fluctuates from about eight hundred and fifty to as high as eighteen hundred, depending upon the level of business activity. Its divisions are: major construction, mechanical plumbing, show service, residential construction, industrial drives, heating/air conditioning, staging/production, automated manufacturing, and motor rewind/repair.

13. Ainsworth's head office is located at 131 Bermondsey Road in Toronto. It has regional offices outside of Ontario in Vancouver, Edmonton and Saskatoon, and Halifax. Within Ontario, Ainsworth has regional offices in Windsor, London, Cambridge, Oshawa, and Ottawa/Hull.

Within Metropolitan Toronto, it has satellite offices including ones at: Scotia Plaza, B.C.E. Place, T. D. Tower, 4 King Street West, 10 Temperance Street, Skydome, Metro Toronto Convention Centre, and the Toronto International Centre of Commerce.

14. The nature and extent of Ainsworth's operation, is illustrated by the marketing information filed with the Board. This material is intended to promote Ainsworth's business and lists many of the projects with which the company has been involved. The following excerpts give the flavour of Ainsworth's business activities:

Since 1933, we have developed a talent pool in excess of one thousand highly skilled people. They come from the electrical, mechanical and electronic trades and from the engineering disciplines. Their abilities enable Ainsworth to provide a very wide range of world class technical problem solving services.

We are best known as a major electrical contractor with an outstanding knack for getting jobs done on budget and on time. Critical work on larger projects can range from the design and installation of complete power systems to the integration of fire safety, security and complex lighting control systems.

But that's just one aspect of our company. Ainsworth has four major business initiatives...industrial and commercial construction...technical services...automated manufacturing...and show services. Besides handling electrical and mechanical installations on projects the size of Skydome, we can also install a fully integrated HVAC system for you. Or troubleshoot your plant break-down. Or revamp your entire communications system. Or design and service your next trade show exhibit. ...

Ainsworth has installed the electrical and mechanical systems for many of the best known structures and companies in Canada. These include the CN Tower, Manufacturers Life, Scotia Plaza, Toronto Dominion Centre, ...the Skydome Stadium. In order to work on these projects and other mega projects, we must be a successful bidder on closely specified contracts. This often requires the development of innovative design ideas in order to bring the total project price within the owner's budget guidelines without compromising quality. That is why we often become significantly involved in the design of the system to be installed in addition to functioning as its builder ...

Ainsworth has one of the largest range of contractor trade skills available in Canada. We have people who can design, install, repair and maintain virtually any type of electrical or mechanical system within your building or your business.

We have electricians, mechanics, and electronic technicians. We have automation, refrigeration and HDAC specialists. From millwrights, to motor rewinders, from sheet metal workers to substation specialists, Ainsworth has the technical service people you need, right when you need them ...

Regular plant maintenance is another area where Ainsworth leads the way. Our people handle pre-scheduled periodic inspections and routine maintenance, plus planned repairs and overhauls ...

We handle an enormous range of such complex tasks each year whether its emergency, a planned maintenance program, or a once in a lifetime assignment ...

Each year, Ainsworth's show division provides behind the scenes back up for over eight hundred trade and consumer shows, conventions and seminars, events and stage productions. We do more work in this area than all other Canadian companies combined.

Ainsworth supplies complete electrical, mechanical and lighting support services for show managers, impresarios, exhibitors and stars right across Canada. We handle projects on a regular basis from Halifax to Vancouver and have permanent offices in several key locations coast to coast ...

Here are some of the basic services we provide: site assessment - co-ordination with show and facility management - floor plans with electrical and mechanical layouts - wiring - fixed and control lighting - plumbing - air-conditioning - heating - installation, disassembly, removal and storage ...

Ainsworth's show division is also well-known for its comprehensive staging services. We can design and execute an entire event for you. Or you can call on us to supply a single element such as lighting or rigging. Along with electrical and mechanical back-up, Ainsworth offers many types of extremely specialized production assistants. These include: event co-ordination, technical production, stage and set design, lighting design, and special effects ...

15. Ainsworth has a wide and varied customer base. Stadco is not its only or even its major customer; nor is the Dome its only operational location - even for "show services". Ainsworth's show services group, services both trade shows and staged productions at numerous facilities across Canada including: the Pacific National Exhibition grounds Trade-Ex Centre, Edmonton Convention Centre, Regina Exhibition Park, Hamilton Convention Centre, Copps Coliseum, Toronto International Centre of Commerce, The Metro Convention Centre, Exhibition Stadium, Markham Fairgrounds, Halifax Metro Centre, etc. Again, Ainsworth's marketing material gives the flavour of these business activities:

Ainsworth's show division helps more shows and events to take place in Canada than all other contractors combined. For more than forty years, we have provided a comprehensive range of support services and supplies for show managers and exhibitors. Our back-up can include: site assessment, utility layouts for new facilities, design and layout of electrical and mechanical services, project co-ordination, wiring, lighting, plumbing, air-conditioning, staging, fabrication, installation, start-up, maintenance, and removal. Our show division co-ordinates the resources and efforts of all Ainsworth's companies and subsidiaries to give you the precise degree of show service you require... In all cases, Ainsworth's show division is able to supply just what you need, exactly when you need it. Our project teams are custom assembled to provide all the skills required to make our part in your event a solid success. [Ainsworth is] a leading electrical and mechanical contractor employing hundreds of skilled people in offices across Canada. Ainsworth offers large scale, multi-trade services from major trade and consumer events. The company also provides a full range of electrical and mechanical support services for shows, and events at convention centres, hotels, halls and fair grounds. [Ainsworth supplies] general staging contractors with special skills and show co-ordination, fixed and control lighting, rigging and backdrops [and] a wide range of additional staging services ... you can call us at any point in your planning for our show services. If you wish we can co-ordinate and manage the physical aspects of your entire show project right from the start. Or, we can provide full support in electrical, mechanical or lighting areas. Whether you need design, installation, maintenance or removal service. It's yours with a phone call ...

16. One small aspect of the business of Ainsworth, involves the supply of "electrical and mechanical contracting services and systems and staging systems" at the Skydome Stadium, as and when engaged.

17. Ainsworth recruits and maintains its own mix of employees, for which Ainsworth alone is responsible. Stadco has no involvement whatsoever, nor does Stadco have any control over the manner in which Ainsworth deals with its employees. Quite a number of those employees are represented by trade unions. Ainsworth is bound by a number of negotiated collective agreements (electricians, plumbers, etc.). Stadco has no involvement in these collective bargaining activities.

18. IATSE is one of the unions with which Ainsworth has a collective bargaining relationship. IATSE has bargaining rights in respect of certain employees and employment opportunities at the Dome Stadium. IATSE's bargaining rights are limited, and site specific. We shall have more to say about that below.

19. When Ainsworth is engaged to supply services, at the Skydome either by Stadco or a

promoter using the Dome Stadium, the amount of labour required is usually specified in advance by Stadco, or the promoter as the case may be. Ainsworth is solely responsible for selecting and providing any labour involved, for determining the terms and conditions of employment, and for making all payments of wages and benefits to the employees it engages. The labour force used by Ainsworth to supply services to Stadco or other promoters at the Skydome Stadium, whether unionized or non-unionized, is totally separate and independent from any staff directly employed by Stadco. To the extent that those employees are governed by collective agreements, Ainsworth is responsible for administering the terms of those agreements, including grievance procedures, hiring hall arrangements, union security provisions, and so on. Stadco has no involvement whatsoever, nor has Ainsworth suggested that Stadco is its representative for any of these purposes.

20. Each corporation has control of its own labour relations and human resource functions. Stadco has its own employees which are supervised, directed and managed separately from the employees of Ainsworth or any other suppliers of goods and services.

21. Stadco and Ainsworth are not represented to the public as a single integrated enterprise. Ainsworth maintains its own discreet corporate identification on its equipment in the Stadium, as well as on the attire of Ainsworth employees and agents. This distinctive marking distinguishes the Ainsworth employees and equipment from those of Stadco.

22. In its role as owner and operator of the Skydome Stadium, Stadco will co-ordinate the activities of the various suppliers on site - including Ainsworth. But the sole responsibility for carrying out Ainsworth's service contracts and directing Ainsworth's work force, remains with Ainsworth.

23. Except for a brief period of time at the end of 1992, Ainsworth has had its own production manager on site, with responsibility for the Ainsworth employees. There is no reason for those employees to believe that they might be working for someone else, or to believe that Stadco is their employer. Nor is there any basis for confusion on the part of Stadco employees. There are, for example, no interrelated payroll arrangements, or any other business arrangements which might prompt employees to wonder about the identity of their employer.

24. IATSE does not suggest otherwise. IATSE does not claim that it represents Stadco "stage" employees or that those employees want to be represented by IATSE, or that they "really" work for Ainsworth. IATSE claims that certain Stadco employees "should" be its members because they are doing work at the Stadium which its members are qualified to do.

25. There are numerous activities involved in the operation of the Skydome Stadium, and the presentation of events, other than the supply of "electrical and mechanical services and systems and staging systems" (i.e. the generic package of services which Ainsworth contracts to supply). Those activities may well involve work by Stadco employees that is similar to that done by Ainsworth employees (electrical work, stagehands work, etc.), or the employees of other contractors on site; moreover, such work might be undertaken in conjunction with what Ainsworth is doing, or might be doing if so engaged. However any overlap in the activities of Stadco's personnel with those of Ainsworth employees (which may occur from time to time) is incidental or peripheral to the core activities of Stadco's business.

26. Payment by Stadco for the services of Ainsworth is made on the basis of invoices which are sent by Ainsworth to Stadco on a regular basis. The relationship is contractual. There is no sharing of assets or equipment or interchange of employees.

27. The commercial history of the Dome is not a particular happy one (hence its passage

into the hands of the current owner); however certain aspects of that history must be mentioned, briefly, because they explain Ainsworth's current involvement and relationship with Stadco.

28. In its initial conception, the Dome was to be primarily a private venture, operated for the profit of its investors. Private investors were recruited and contributed significant sums to an entity known as Dome Consortium Investors ("DCI"). In return they received shares in DCI.

29. DCI was to form a partnership with Stadco that would construct and run the Stadium. Ainsworth was one of a number of investors in DCI (although apparently not part of the original group). Ainsworth was also a mechanical contractor, involved in the initial construction of the Dome.

30. But the business efficacy and continuing involvement of DCI were both contingent upon the maintenance of debt ceilings which, as it turned out, were substantially exceeded. Financial reverses derailed the initial business plan and, in the result, the partnership with DCI never materialized. Indeed, in January 1993 Stadco entered into an agreement with a *new* entity known as Stadium Acquisitions Inc., which is to acquire the Skydome Operation. Stadium Acquisitions Inc. includes some of the initial members of DCI. But Stadium Acquisitions Inc. does not include Ainsworth.

31. As a result of Ainsworth's participation in the consortium involved in the construction of the Stadium, Ainsworth obtained contractual arrangements which survived the demise of the initial plan, and currently regulate its relationship with Stadco. Under what are described as a Preferred Supplier Rights Agreement, and an Official Supplier Agreement, Ainsworth has obtained a right of first refusal with respect to "the provision and maintenance of electrical and mechanical contracting services and systems and the supply of staging systems" to Stadco and other users of the Dome - provided that it is able to supply the services specified at competitive market rates. This latter qualification is significant, because the agreement is not an exclusive arrangement, nor has the business relationship between Stadco and Ainsworth been a totally amicable one. Not only are the contracting parties operating at arms length, but there has recently been litigation between them concerning what services Ainsworth may supply, and the terms on which it may compete with other suppliers. The details of this litigation are not here relevant. It suffices to say that the litigation illustrates that the relationship is essentially one of owner - sub-contractor, rather than common principles involved in a joint venture.

32. As we have already noted, the Official Supplier Agreement is not, in fact, an exclusive arrangement for the supply of the disputed services to Stadco. Ainsworth provides its services and equipment to numerous customers at the Dome other than Stadco, and to customers other than Stadco and the promoters using the Dome. Similarly, Stadco is not required to, and in practice does not, engage the services of Ainsworth at every event, or in all circumstances where such services are required at the Stadium. There may be a dispute between Stadco and Ainsworth about what proportion of these services should be channelled in Ainsworth's direction, but it seems clear that Ainsworth is not entitled to an exclusive arrangement and that, in practice, Ainsworth has not been engaged for "Stadco events".

33. The fluid requirements and utilization of Ainsworth's business are reflected in its Recognition Agreement with IATSE. The recognition clause in the current collective agreement reads as follows:

ARTICLE ONE - RECOGNITION AND JURISDICTION

1.1 Ainsworth recognizes the Union as the sole bargaining agent for all stage employees

engaged by Ainsworth to perform work at the SKYDOME STADIUM in the City of Toronto, Ontario within the jurisdiction of the Union as expressly stated in this Article.

1.2 The Jurisdiction of the Union under this Agreement extends only to the jurisdiction expressly stated in this Article and no jurisdiction that is not expressly stated in this Article shall be inferred.

1.3 The Union has no jurisdiction over any sporting or athletic events; any circus events; any consumer or trade shows; any events utilizing booths or displays; any charitable events; or any other events of a similar nature (the "Excluded Events").

1.4 The Union has no jurisdiction over any temporary or permanent in-house rigging, lighting, sound or electronic equipment at the SKYDOME STADIUM, whether fixed or moveable unless Ainsworth is engaged to supply stage employees with respect to that equipment.

1.5 The Union has no jurisdiction over the electrical power hookup of any temporary or permanent equipment.

1.6 The Union has the jurisdiction to unload, set up, put on, tear down, and load any temporary stages, rigging, scenery, sets of properties, lighting or sound equipment where Ainsworth is engaged to supply stage employees with respect to that equipment and the event is not an Excluded Event.

1.7 Ainsworth has the right to require stage employees to work on an Excluded Event but the exercise of this right by Ainsworth will not extend the Union's jurisdiction under this Article.

1.8 The Union recognizes that Ainsworth has collective agreements with other unions and agrees that the jurisdiction under this Article shall not infringe on the jurisdiction of any other union that has a collective agreement with Ainsworth.

34. By its terms, the agreement is only applicable "where Ainsworth is engaged to supply stage employees with respect to that equipment and the event is not an excluded event" - recognizing the commercial reality that Ainsworth is not always engaged to supply its particular services, or to service particular events. Ainsworth has an option to provide certain systems (not employees specifically) under certain circumstances, but it is not an exclusive arrangement and that is recognized in the agreement with IATSE.

35. We might also note, parenthetically, that the contractual arrangement between Ainsworth and Stadco has existed for some years, yet IATSE have never previously asserted that Stadco and Ainsworth are one employer for labour relations purposes. IATSE has never previously asserted that it represents Stadco employees. It has signed no recognition agreement with Stadco. Nor, in fact, is there any evidence, at the time that IATSE entered into its first voluntary recognition agreement with Ainsworth in 1989, IATSE had actually enrolled into membership any employees of Ainsworth, Stadco, or anyone else involved at the Dome.

III

36. Having reviewed the circumstances of this case, it is our view that the commercial and labour relations situation does not reveal the "mischief" which section 1(4) was designed to cure. This is not a case where commercial law arrangements collide with those of labour law, or where common principles have tried to manipulate corporate shells in order to erode established bargaining rights or avoid collective bargaining obligations. On the contrary. It is the union in this case which seeks to extend its bargaining rights to the employees of a separate employer whom it has never previously sought to represent.

37. In our opinion, the situation here is essentially that of owner - sub-contractor, not a

joint venture; and while there may well be sub-contracting arrangements which can attract the application of section 1(4), we are not persuaded that this is one of them. The situation here is similar to that in cases such as *Charming Hostess Inc.*, [1982] OLRB Rep. April 536, *Ethyl Canada Inc.*, [1982] OLRB Rep. July 998 or *Federated Building Maintenance Company Limited*, [1985] OLRB Rep. November 1585, where the Board refused to collapse a sub-contracting arrangement merely because “work” which might have been done by the employees of a sub-contractor was now being done by an owner. The fact that an owner may choose to have certain work done by its own forces, or to have some or all of it done by a sub-contractor, does not provide the basis for a section 1(4) declaration or an extension of bargaining rights to the employees of such owner (be it a chemical manufacturer as in *Ethyl*, a beer manufacturer as in *Charming Hostess Inc.*, an automobile manufacturer, or, as here, a company running an entertainment complex).

38. What IATSE is seeking to do in this case is not protect bargaining rights which it has established with Ainsworth, but rather expand those bargaining rights to a customer of Ainsworth which decides to use the services of Ainsworth in varying proportions. To put the matter another way: the union acquired the right to represent employees hired by Ainsworth by voluntary recognition and agreement with Ainsworth, but it neither acquired the right to represent employees of someone else, nor acquired any rights in respect of work opportunities which do not happen to come to Ainsworth because Ainsworth has not been engaged to supply the electrical systems in question.

39. In our opinion, this is not an appropriate case for the application of section 1(4), even if the sub-contracting arrangements here under review might meet a literal reading of section 1(4). Accordingly, it is unnecessary for us to consider how we might fashion a related employer declaration so as to limit its application to stagehand services within the jurisdiction of IATSE, and exclude implications for collective agreements which Ainsworth has with other trade unions. Nor is it necessary to decide whether section 1(4) can actually apply to a publicly-owned enterprise such as Stadco; for even if it could, this is not an appropriate case for its application.

40. For the foregoing reasons, the application is dismissed.

1924-93-M Laundry & Linen Drivers and Industrial Workers Union, Local 847, Applicant v. CMP Group (1985) Ltd., Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Board directing employer to reinstate employees on interim basis pending disposition of unfair labour practice discharge complaint - Employer also directed to provide copy of Board notice to all employees affected by union's certification application

BEFORE: *Russell G. Goodfellow*, Vice-chair, and Board Members *R.W. Pirrie* and *C. McDonald*.

APPEARANCES: *Elizabeth M. Mitchell*, *Philip Spurrell*, *Balvinder Sangha* and *Gurjit Pal Singh* for the applicant; *Brian W. King*, *Julie Padamsey* and *Salima Padamsey* for the responding party.

DECISION OF THE BOARD; September 20, 1993

1. Having regard to the material before it and the submissions of the parties, the Board is

satisfied that there is an arguable case for the relief requested in the main application and that the balance of harm favours the applicant. Accordingly, the Board hereby directs that the responding party forthwith reinstate Balvinder Sangha and Gurjit Pal Singh, on an "interim basis", pending the final disposition of their unfair labour practice discharge complaint in Board File No. 1922-93-U.

2. The Board further directs that the responding party post the notice attached as Appendix "A" in prominent places in the workplace, where it is most likely to be seen by employees interested in these proceedings. The responding party is also directed to provide a copy of this notice to all employees affected by the union certification application in Board File No. 1923-93-R.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH A DIRECTION OF THE BOARD, ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO MAKE SUBMISSIONS.

THE BOARD HAS ORDERED CMP GROUP (1985) LTD. TO REINSTATE BALVINDER SANGHA AND GURJIT PAL SINGH ON AN INTERIM BASIS UNTIL THE BOARD CONSIDERS THE REASON FOR THEIR DISCHARGE. A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON OCTOBER 12, 1993. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY BALVINDER SANGHA AND GURJIT PAL SINGH WERE LAID OFF.

IF THE BOARD ULTIMATELY DETERMINES THAT BALVINDER SANGHA AND GURJIT PAL SINGH WERE LAID OFF FOR ECONOMIC REASONS, AND THAT THEIR SUPPORT FOR THE UNION HAD NOTHING TO DO WITH IT, THE TEMPORARY REINSTATEMENT ORDER WILL BE REVOKED, AND THE COMPANY WILL NO LONGER BE REQUIRED TO EMPLOY THEM.

IF THE BOARD ULTIMATELY FINDS THAT THEIR LAY-OFF OCCURRED BECAUSE THEY WERE UNION SUPPORTERS, EXERCISING THEIR RIGHTS UNDER THE LABOUR RELATIONS ACT, THE BOARD MAY CONFIRM THEIR REINSTATEMENT, AND DIRECT THAT THEY BE COMPENSATED FOR ALL EARNINGS AND BENEFITS LOST AS A RESULT OF THEIR DISCHARGE.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT TO OPPOSE A TRADE UNION, OR SUBJECT TO THE UNION SECURITY CLAUSE IN THE COLLECTIVE AGREEMENT WITH HIS OR HER EMPLOYER, REFUSE TO JOIN A TRADE UNION.

AN EMPLOYEE HAS THE RIGHT TO CAST A SECRET BALLOT IN FAVOUR OF, OR IN OPPOSITION TO, A TRADE UNION IF THE ONTARIO LABOUR RELATIONS BOARD DIRECTS A REPRESENTATION VOTE.

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED BY AN EMPLOYER OR BY A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING THE UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IT IS UNLAWFUL FOR EMPLOYEES TO BE FIRED OR IN ANY WAY PENALIZED FOR THE EXERCISE OF THESE RIGHTS. IF THIS HAPPENS, A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

IT IS UNLAWFUL FOR ANYONE TO USE INTIMIDATION TO COMPEL SOMEONE ELSE TO BECOME OR REFRAIN FROM BECOMING A MEMBER OF A TRADE UNION, OR TO COMPEL SOMEONE TO REFRAIN FROM EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

CMP GROUP (1985) LTD.

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 20TH day of SEPTEMBER, 1993.

1140-92-R Practical Nurses Federation of Ontario, Applicant v. Englehart & District Hospital Inc., Responding Party

Bargaining Unit - Certification - Board reviewing and considering *Mississauga Hospital, South Muskoka Memorial Hospital and Strathroy-Middlesex General Hospital* cases - Board finding union's proposed bargaining unit, comprised solely of those employed as registered or graduate nursing assistants, appropriate - Certificate issuing

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members J. A. Ronson and D. A. Patterson.

APPEARANCES: Douglas J. Wray, Barbara Parker, Laurie Laframboise and Otalene Shaw for the applicant; Allan Shakes and Jackie Leroux-Thomas for the responding party.

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER D. A. PATTERSON:
September 20, 1993

1. This is an application for certification which involves the issue of the appropriateness of a bargaining unit composed entirely of registered and graduate nursing assistants as follows:

all employees of Englehart and District Hospital employed as registered or graduate nursing assistants in the Town of Englehart, save and except head nurses and persons above the rank of head nurse.

The respondent says that this unit is inappropriate and the Board should include registered nursing assistants in either a service or a paramedical unit.

2. For the recent history of the applicant union's organizing of RNA's, and the context in which the parties argued this case, see *The Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380, *South Muskoka Memorial Hospital*, [1992] OLRB Rep. April 520 and *Strathroy-Middlesex General Hospital*, [1992] OLRB Rep. Oct. 1103, referred to below in abbreviated form as *Mississauga Hospital*, *South Muskoka* and *Strathroy-Middlesex*. A similar application in *Wingham & District Hospital*, Board File 2610-92-R, was heard in the same week as this case.

3. At the outset of the hearing, the Board canvassed the issue of the list of employees who would fall into the applicant's proposed bargaining unit. There were no disagreements on what employees were included on the list for the purposes of the count.

Facts

4. The parties stipulated facts which were not disputed in any important respect. These are summarized below.

5. The respondent is a 35-bed hospital in northern Ontario with 84 employees. There are 14 RNA's, three of them full-time. All of the 11 part-time RNA's are job sharing. The full-timers work a 12 hour shift while the part-timers work a combination of 4 and 12 hour shifts. All the RNA's work on one nursing unit. There is no operating room or other specialized units as one would find in a larger hospital, other than an emergency room, where no RNA's work.

6. The applicant's bargaining unit would consist of 14 RNA's. The respondent's proposed service unit would include the RNA's for a total of 38 employees in total, 12 full-time and 26 part-time, inclusive of 3 full-time and 3 part-time ambulance attendants. The respondent's alternative paramedical unit would have twenty-one people, seven from lab, radiology and physiotherapy,

together with the 14 RNA's. A nursing unit, including RN's and RNA's, would have consisted of 26 employees. Although the possibility of a combined nursing unit was discussed at the hearing, since that time an RN - only unit has been certified on an interim basis.

7. The RNA's work under a head nurse who is a registered nurse. To provide full-time and part-time coverage, the RNA's are scheduled in combination with registered nurses of whom there are 8 full-time and 4 part-time, exclusive of the head nurse.

8. There is no employee association at this Hospital. Other than the recent certification of an RN unit on an interim basis, there are no trade unions with bargaining rights at this hospital, and no trade union had held bargaining rights before this application.

9. There are no orderlies employed at the Hospital. There is one part-time ward clerk who also works part-time as a service co-ordinator, a management position. The applicant does not claim the ward clerk as in the RNA unit. Other classifications at the Hospital are dietary aide, housekeepers, and one maintenance person. Dietary and housekeeping employees work different hours under a different supervisor. There are 11 office and clerical employees, 4 full-time and 7 part-time.

10. There is one person listed as an RNA who also does work in the central supply room (CSR) and x-ray which would be outside of the bargaining unit sought by the applicant. The parties agree she is not employed as an RNA when doing so. This person is someone who had worked for many years as a full-time RNA. To reduce the amount of heavy work as an RNA she commenced job-sharing her full-time RNA position and worked that way for three to four years. When part-time work became available in CSR and x-ray she picked up those extra hours. Her status at the date of application was that she was job-sharing her full-time RNA job and picking up extra hours in CSR and x-ray, work for which RNA qualifications are not required. There are 2 other employees who have RNA classifications but who are not now employed in an RNA job.

11. There is no one working in this Hospital in RNA work who is not qualified as an RNA or a graduate nursing assistant.

12. For the history of the RNA classification and qualification and how that has changed over time we were referred to the decision of the Board in *Mississauga Hospital*, cited above. We were also given four examples of collective agreements with RNA-only bargaining units, being agreements between the Toronto Hospitals and SEIU, Local 204, Victoria Hospital Corporation and London and District Service Workers Union, Local 220, Brockville General Hospital and CUPE, Local 252/03 and the Women's Christian Association of London and London and District Services Workers Union, Local 220.

13. The respondent underlined that because the Hospital is so small by necessity everyone works very closely together. Even management does things like work in the stores department. The Hospital does not recognize RNA's as a separate group within the Hospital.

14. The CSR department is composed of two part-time attendants who are RNA qualified and a manager. When hiring CSR attendants, the Hospital looks for RNA qualifications, but employment in that job is not considered employment as an RNA. Both the CSR attendants also do part-time work in the radiology department which does not require RNA qualification. As noted above, one of these people is job-sharing a full-time RNA position. The other transferred out of the RNA classification 10 to 11 years ago and has not worked as an RNA since.

15. Similarly, the hospital requires RNA qualification for the position of physiotherapy

aide, which is not considered employment as an RNA. The current physiotherapy aide is an RNA who transferred seven years ago and has not worked as an RNA since. There is one full-time physiotherapist and a three-quarter time Physiotherapy aide. A full-time RNA has recently started doing vacation and sick leave relief for the aide.

16. The current nursing unit clerk is qualified as an RNA but moved out of RNA work into the clerk position over a year ago. A full-time ambulance attendant was also formerly employed as an RNA before qualifying as an ambulance attendant about 10 years ago. Since then she has not worked as an RNA.

17. About a year ago, one full-time RNA started doing part-time pulmonary and hearing testing for local industry four hours a week, after which she finishes the day as a regular RNA shift.

18. The salaries and benefits for RNA's have generally been kept in line with service employees following the increases for SEIU and CUPE in their central bargaining with participating hospitals. One exception to this is vacation in which RNA's have higher vacation benefits up to 15 years of service, as do ambulance attendants.

19. As to the relevant facts not specific to this hospital, both parties referred to the findings of fact in the cases cited above, which need not be repeated here, although we have considered them. As well, the hospital made reference to the fact that there are only 16 hospitals which do not have a collective agreement with a service employees unit.

20. The hospital underlines that there is no history such as in *the Mississauga Hospital, supra*, where the RNA's had previously opposed an application for certification by the Steelworkers and then organized themselves.

21. The hospital also made reference to the new *Regulated Health Professions Act*. Although it has not yet been proclaimed, with the exception of some transitional provisions, it will give self-governance to more professions than the previous *Health Disciplines Act* did.

The Parties' Submissions

22. Both parties adopted the submissions made in support of their respective positions in the earlier jurisprudence cited and that portion of their arguments will not be set out in detail here although we have carefully considered those submissions.

23. The union relies on the recent Board decisions of *Mississauga Hospital* and *South Muskoka* to argue that its proposed unit is an appropriate unit, and that on the test in the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board should grant its unit. It stresses that the facts are different from those in *Strathroy-Middlesex*. The union also submits that the approach of the majority in that case is incorrect in that it goes back to historically anomalous reasons which do not hold up under closer scrutiny, and which were rejected in *The Mississauga Hospital* and *South Muskoka*.

24. The union canvassed the reasons that supported the historical approach and divided those into three categories. Firstly, dealing with the history of the Board's practice not to grant RNA-only units, the union submits that the practice was not invariable. In 1972 the Board gave a service unit which excluded RNA's at the then Toronto General Hospital. Twenty years later the RNA's are still covered by a separate collective agreement in one of the province's largest hospitals. The union argues that the examples given of collective agreements with RNA only units indi-

cate that there are several long-standing collective bargaining relationships, an indication that such a unit can be viable. Nine certificates have now been given to this applicant in the last year, several on agreement of the parties. History has been changing. Moreover, the union argues that, in any event, the past should not be determinative on the issue of appropriateness of the bargaining unit.

25. The second reason traditionally given for not granting an RNA bargaining unit is community of interest. The union refers to the Board's jurisprudence on the variable degrees of community of interest ranging from that of all employees in one place of employment down to other possible divisions, as set out in *The Ottawa Citizen*, [1987] OLRB Rep. Aug. 1098. The union says, relying on *Harlequin Enterprises Ltd.*, [1987] OLRB Rep. Feb. 226, that the real test is viability. The union submits that the question of community of interest is fundamentally one of degree in each case. When looking at the units proposed by the respondent, the union submits that the community of interest with the service unit is the most tenuous of the alternatives. It is argued that the service workers work in a different environment doing a different kind of work with different qualifications, wage rates and supervision. Although there might be more community of interest with other groupings in the hospital such as with RN's or paramedical staff, the union stresses that the main point is that the board does not have to choose the most appropriate unit. The issue is only whether the RNA unit is *an* appropriate unit.

26. The third reason traditionally given for not granting an RNA only unit is fragmentation. The union refers to *The Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371 at paragraphs 16 and 17 and to *Mississauga Hospital*, at paragraph 22, as well as *The Board of Education of the City of Toronto*, [1970] OLRB Rep. July 430 and *Simcoe County Association for the Physically Disabled*, [1992] OLRB Rep. July 857. The underlying concept, in the union's view, is that there is a tension between community of interest and self determination on one hand and undue fragmentation on the other hand. These tensions were analyzed at length in *Hospital for Sick Children*, *supra*, and produced the oft quoted one-liner as to whether or not the unit is viable without causing serious labour relations problems to the respondent.

27. The union argues that to refuse the unit applied for would be to say to the RNA's who have organized themselves that they have to convince their coworkers that they also should be represented by this union in order to have their right to self-determination and organization. Counsel refers to paragraphs 44 to 46 of *The Mississauga Hospital*, where the Board discussed the question of appropriateness in the context of both the bargaining history of the RNA's and the right to self-determination expressed in section 3 of the Act.

28. The union distinguishes *Strathroy-Middlesex Hospital*, *supra*, on the facts set out at paragraph 49 of that decision and says those concerns do not apply on the facts of this case. The union is not asking for the inclusion of any RNA who is not qualified but working as an RNA nor anyone who is RNA qualified but not working as an RNA. The uncertainty of the parameters of the bargaining unit which concerned the Board in *Strathroy-Middlesex* do not exist at this Hospital, in the union's view. The bargaining unit is not loose or elastic. Union counsel submits that the respondent had no difficulty putting the list together, and the union has not questioned it.

29. The union underlines that all of the movement from and to the RNA classification consists of 7 people in more than a decade, describing this as a very short list over the last eleven years. There are three individuals who regularly work as RNA's but who on occasion do other work. Some RNA's job share full-time RNA positions.

30. The union asserts that these movements out of the RNA classification are not unusual and cannot by any stretch be considered serious labour relations consequences. Counsel says that vacation relief outside of the bargaining unit happens all the time in all kinds of bargaining units.

Even management does bargaining unit relief on a temporary basis in many work places. The union queries rhetorically whether someone doing office and clerical duties part-time in addition to a manufacturing job would make the manufacturing unit inappropriate. Counsel argues that all of the other movements are promotions or moves on a permanent basis dating from several years ago and should not be relied upon as an obstacle to the bargaining unit requested. There are no people coming into the proposed unit. The union indicates it would not want to stop job mobility in any event, but rather wishes to protect and encourage job opportunities for the people they represent. The union does not agree that unless there are water-type compartments there are serious labour relations problems. Counsel offers the example of full-time and part-time bargaining units.

31. The union says that the other reason the Board did not certify the RNA unit in *Strathroy-Middlesex* was that, as set out at paragraph 52 of that decision, the Hospital had not sought to set the RNA's apart, but had dealt with the staff association as a whole. At Englehart & District Hospital there is no staff association at all which makes it distinguishable on this factor. In any event the union agrees with the dissent in that case that the regime before the union is certified is not what should determine what is an appropriate bargaining unit. In any event the union suggests that it is a leap in logic to use the comments in *Mississauga Hospital* and *South Muskoka* about the employer's own treatment of the employees to determine bargaining unit appropriateness. Its use in those cases was to say to the employer, "How can you suggest there are serious labour relations consequences if you yourself were treating them separately?" The union argues that the employer's own practice undermined the employer's argument in those cases but it would be a leap of logic to conclude in other cases that there will be serious labour relations consequences if they have not been treated separately before.

32. The union submits that other aspects distinguish *Strathroy-Middlesex* as well. Firstly, there are facts that were not referred to in *South Muskoka* and *Mississauga Hospital* such as that people move from job to job. The union asserts that it is not likely that this was actually different in the *South Muskoka* and *Mississauga Hospital* workplaces, but that in any event it is insignificant. Counsel queries why minor movement should create serious labour relations difficulty. The union suggests such a factor should not be relied on as a single criterion. It is argued further that such a proposition cannot be found elsewhere in the jurisprudence. The second distinguishing factor in *Strathroy-Middlesex* refers to the employer not treating RNA's separately as a group. The union argues that the fact that there is no association in this Hospital makes this a non-factor.

33. In summary the union says that a community of interest exists among the RNA's, the RNA only unit is an appropriate bargaining unit, and the employer can not point to any serious labour relations consequences that would necessarily result from the unit requested.

34. The employer referred us to the *Strathroy-Middlesex* decision where the employer made and the Board accepted the same arguments as they rely on in the present case. The employer points out that the *Mississauga Hospital* and *South Muskoka* cases were not intended to be conclusive for all situations. The employer argues that prior to *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, which is referred to in *Strathroy-Middlesex*, there had been a proliferation of bargaining units in the hospital sector. The Board tried to control that and determined the four general bargaining units outlined in paragraph 18 of the *Strathroy-Middlesex* decision. Those have been followed consistently over the years in the employer's view. We were referred to the *Hospital for Sick Children*, cited above, and *Kidd Creek Mines*, [1984] OLRB Rep. Mar. 481 and [1986] OLRB Rep. June 736.

35. The employer is concerned about fragmentation, as was the Board in those cases. The employer notes that even prior to 1976, the Board had declined to certify an RNA unit in *Essex*

Health Association, [1967] OLRB Rep. Nov. 716 and *St. Joseph's General Hospital*, [1968] OLRB Rep. Sept. 558. The industry has relied on that jurisprudence, which the employer says should not be disturbed. It has only been opened up since *Mississauga Hospital*.

36. The employer refers to paragraph 38 of the *Hospital for Sick Children* for the argument that it is too late to say that the RNA's can not be in the service unit. Any community of interest the RNA's have among themselves does not preclude the inclusion in the service unit in the employer's view. Where unionized, RNA's are currently found in service units; the employer knows of no situations where they are represented in an RN or paramedical unit. Nonetheless, the respondent argued that because there were no other bargaining units in the hospital at the time of hearing, one could also fashion an alternate bargaining unit such as nursing or paramedical.

37. The employer refers to the report of the Hospital Inquiry Commission in 1974, which recommended three standard bargaining units in the hospital sector: service, nursing and paramedical. The employer submits that is the situation at the moment in many hospitals. The only exception may be that there are more office and clerical units forming.

38. The employer argues that it is a relevant consideration for the Board that there are only 16 units left outside of the current voluntary central bargaining arrangements in the hospital sector.

39. The employer argues that the Board and the government are both interested in reducing fragmentation. We were referred to the changes to sections 7 and 8 in the Bill 40 amendments to the Act, in effect since January, 1993. By the very fact that PNFO can only represent RNA's they are bound to contribute to fragmentation, asserts the employer. The employer acknowledges that there is no employee association as in *Strathroy-Middlesex*, but says that what is important is the use made of this issue in the *Mississauga Hospital* case. Further, it is a distinguishing factor from *Mississauga Hospital*, where the Hospital did treat RNA's separately.

40. The employer submits that the aspect of people moving in and out of positions in the bargaining unit proposed is similar to the situation at *Strathroy-Middlesex* and is a factor on which this case cannot be distinguished. The movement at the moment represents three people providing relief or doing temporary work. The employer submits that although that may not seem like a lot on an absolute basis, it is over twenty per cent of the bargaining unit that the union is asking for.

41. Noting that the salaries and benefits are generally now in line with the centrally bargained service unit settlements with the exception of vacation, the employer argues that to allow "carving out" from the long established service group is an invitation to proliferation, especially in the paramedical area, and especially in light of the new *Regulated Health Professions Act* (Bill 43, c.18, S.O., 1991). Once this is opened up, the hospital argues there is no telling where it would stop.

42. The employer stressed the specific problems in this Hospital. Firstly, it is a small hospital and a small group of RNA's. Proliferation has an added impact with limited funds in a small institution like this one. It is said that the cost of bargaining with more than one bargaining unit are potentially astronomical. There is no possibility of central bargaining and there will be the possibility for leap-frogging and competition between bargaining units.

43. The employer argues that an RNA only unit will impede movement within the Hospital and diminish the job opportunities of RNA's in the Hospital. If they were part of a service unit they could use their seniority in that unit, whereas the employer argues that in a separate RNA unit there will no more rights than someone coming in from the outside. It is submitted that it would also impede people moving from the RNA position elsewhere. This is because a collective

agreement can not give a person rights outside the bargaining unit. On lay offs there will be no right to bump into other positions and no right to posting for available positions elsewhere. The employer cites potential problems with having benefits for such a small group whereas right now all the employees participate in the same benefit regime. The Hospital says it may be difficult to maintain equity between groups because there is another player and different dynamics.

44. The employer cites difficulties with its committee structure having to deal with a number of union - management, negotiation and grievance committees. On committees that already exist, there are now representatives who represent more than just the RNA's. It may be necessary to add someone who represents just the RNA's.

45. The hospital also sees greater potential for jurisdictional disputes and says that elsewhere in the hospital sector, grievances related to lay-offs between bargaining units are on the increase.

46. The hospital underlines that there is a very close inter-relationship between all the people in the hospital in such a small setting. They note the comments of the Board in *Municipality of Metropolitan Toronto* [1992] OLRB Rep. March 315 at para. 44, dealing with an intermingling issue.

47. Returning to *Strathroy-Middlesex* the employer specifically refers to the portions of the decision dealing with the problems the Board found with the proposed unit (paragraphs 36, 38, 42 to 43 and 47). Although it is acknowledged that in this hospital there is no problem with defining who is employed as an RNA, the employer submits there was no problem with that in *Strathroy-Middlesex* either. The person on lay-off was allowed to bump into the porter position and she was on the list. She had been laid off from the bargaining unit but was working in another position. The OR tech was a grandfathered person.

48. The employer also stresses paragraphs 50, 51, and 35 of *Strathroy-Middlesex* and maintains this case is not distinguishable. If the application is rejected the RNA's can simply seek another bargaining agent. The hospital summarized that the bargaining unit applied for would cause hardships and that the situation here is distinguishable from *South Muskoka* and *Mississauga Hospital*. In particular undue fragmentation would cause serious labour relations problems at this hospital.

49. The union replies that much of the employer argument goes to re-arguing *South Muskoka* and *Mississauga Hospital*.

50. The union rejects the employer's argument about central bargaining as irrelevant in one hospital, commenting that even if the union signed up all the employees in the Hospital this argument would be available. It amounts to saying that it is better for the employer if PNFO were to organize all the unorganized Hospitals (or not to organize at all).

51. As to the point about the recent amendments to the *Labour Relations Act*, the union argues that there will not be many consolidations in Hospitals except between full-time and part-time units because of existing separate bargaining agents. The union argues that the Bill 40 amendments were not intended to make organizing more difficult.

52. Union counsel submits that the employer's other arguments amount to saying that there will be some costs and inconvenience if the bargaining unit is granted. This does not amount to serious labour relations problems. Particularly the union says that the points concerning the committee structure and benefits are not at all serious. As to job opportunities, the union says this is

merely a threat that the employees will be worse off if they unionize, to which the union takes exception. Counsel argues that all the matters raised are matters for bargaining and that the union wants employees to have all the opportunities they had and more. He points out that it is not unusual to negotiate rights that may apply outside the collective agreement. Counsel submits that having to bargain about an issue such as lay-offs does not constitute a serious labour relations problem.

53. The union points out that the most likely potential for jurisdictional disputes - with the RN unit - exists even in the configuration set out in *Stratford General Hospital*, cited above, a point recognized in *Mississauga Hospital*.

54. As to a paramedical unit the union says it would need a specific fact situation to know whether it was appropriate - including information about reporting lines and job duties, e.g. whether employees did direct patient care.

55. As to the specific facts at Englehart & District Hospital, the union maintains that the only facts that are different from *Mississauga* and *South Muskoka* are the transfer from RNA's to other jobs which were not alluded to in *Mississauga* and the fact that the RNA's have not been treated as a separate group. Whether or not they are mentioned, they may not be actually different. In any event, there is no serious labour relations problem that flows from these facts that would justify a different result than in the *Mississauga Hospital* in the union's view.

56. On the point about treatment of the RNA's as a separate group, the Englehart & District Hospital group is somewhere between *Mississauga Hospital* and *Strathroy*. In any event the union does not consider this a significant factor. Counsel concluded by arguing that when those two facts are isolated as the only aspects of this case which are distinguishable from *South Muskoka* and *Mississauga*, neither is so serious a labour relations consequence as to make labour relations sense as the determinative criterion as to whether or not the applicant is successful in its request for an RNA unit. The union argues that once the desire of the employees to organize is put into the equation there is no reason to deny what is in its view an appropriate unit.

Decision

57. The Board has thoroughly canvassed the relevant considerations in the cases referred to above. It is not necessary to set out an exposition of that case law. We have carefully considered all the cases we were referred to and have come to the conclusions set out below.

58. We understand the decisions in *Mississauga Hospital* and *South Muskoka* to be acknowledgements of the RNA's anomalous history in relation to collective bargaining unit structure. In *Mississauga Hospital*, the Board referred to a number of cases which express the idea that RNA's might be a better fit in some bargaining unit other than the service unit where they have traditionally found themselves. These include *Board of Health of the York County Health Unit*, [1967] Rep. April 62 where it was said that if the Board were faced for the first time with the problem of determining the appropriate bargaining unit for RN's and RNA's, it might well decide that employees who are concerned with direct patient care shared a community of interest which would entitle them to be in the same bargaining unit. More recently, in *Hospital for Sick Children*, the Board at paragraphs 36 to 38 dealt with the "established practice" of putting RNA's in the service unit. The Board there observed that that fact was the result of historical evolution around the established RN only unit, rather than "any calculated assessment of what would ultimately be the most rational 'shape' for the collective bargaining structure", and remarked that, with the benefit of hindsight, RNA's might conceivably have been grouped with RN's or paramedical employees. Nonetheless, the Board there found that it was also too late to say that the RNA's could not be

included in the service unit. At paragraph 42 of *Mississauga Hospital* the Board reiterated that the nature of the work now performed by RNA's places them with a closer community of interest to either nurses or paramedical employees than the service unit. See similarly, para. 6, 15 and 18 of *South Muskoka* and para. 33 of *Strathroy-Middlesex*.

59. This background does not diminish the fact that *Mississauga Hospital* and *South Muskoka* represent departures from the Board's well-established usual approach, which is to not grant bargaining units defined by department or classification - a fact about which the Board in those cases was not sanguine. That general approach is one of the ways the Board has traditionally expressed its aversion to fragmentation. This was well explained in *Kidd Creek Mines*, [1986] OLRB Rep. June 736 as follows:

23. For many years the Board has been exceedingly reluctant to define bargaining units on the basis of employee classifications or employer departments, because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W. R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Roscoe Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry where departmental unionization has existed in the extreme (based initially upon craft distinctions which predated the current legislative framework), the Board has indicated that it might be less receptive to a continuation of these entrenched organizing patterns of the past, because computerized technology had revolutionized the structure and content of work in the newspaper business. (See *Hamilton Spectator*, [1981] OLRB Rep. Aug. 1177). Most recently, in *T. Eaton's Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board reiterated its view that dividing an employer's business into bargaining units based upon departments would not be conducive to orderly collective bargaining. In *Eaton's*, for example, the Board refused to exclude a specialized department of computer salesmen from a broader "sales" bargaining unit, even though their skills, method of payment, and likely career opportunities were somewhat different from those of the other salesmen:

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25. Concerns about the consequences of fragmentation are not idle speculation, nor have they escaped attention in other jurisdictions. Because of the problems associated with the proliferation of bargaining units in industrial enterprises, the policy in a number of provinces has now shifted away from the recognition of craft units or other similar subdivisions of employees. Following the recommendations of the Woods Task Force in 1968, Parliament amended the *Canada Labour Code* to delete the provisions (similar to section 6(3)) protecting craft bargaining units, and the circumstances in which an existing unit can be splintered are now closely confined (see *Feed-Wright Limited*, [1979] 1 Can. LRBR 296; *Atomic Energy of Canada Ltd.* (1978), 1 Can. LRBR 92; and *Cablevision Nationale Ltée* (1979), 3 Can. LRBR 267 and cases referred to therein). In British Columbia, craft units can be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in a manufacturing context. Even in the construction industry where craft unionism reigns supreme, the Ontario Legislature has intruded. In 1978, the Legislature imposed a system of province-wide bargaining by trade in place of the fragmented system of employer by employer bargaining which existed before. There is now a developing consensus that orderly collective bargaining is not enhanced by fragmenting an employer's work force into a number of competing bargaining units (for a thoughtful analysis of the issues see Paul C. Weiler: *Reconcilable Differences: New Directions in Canadian Labour Law*, Carswell's 1980 at pp. 151-178). Finally, since this Board may not have the power to later consolidate or rationalize the bargaining structure (as the Federal and B.C. labour boards can do), we should be particularly careful in fashioning the bargaining unit in the first place.

These are considerations that are no less relevant today. The question before the Board in this case concerns the weight to be given to those considerations in the face of the recent history of RNA-

only bargaining units before the Board, in particular the three decisions referred to above in which the issue was litigated.

60. The Board is obliged to consider the merits of each case and not apply general approaches, even those as well established as the one outlined above, without regard to the details of the case before it. As the Board has said throughout its bargaining unit jurisprudence, fashioning an appropriate bargaining unit is an exercise in balancing competing interests of both the parties and the public.

61. One set of competing considerations is the desirability of predictability set against the need to be sufficiently open to changes in the workplace and in organizing patterns. The laudable desire for predictability should not be allowed to harden to the extent that it prevents the natural evolution of workplaces to find expression in bargaining unit structures. As the Board indicated in *Stratford General Hospital*, cited above, the search is for a test of appropriateness that stands up to the dynamism of occupational change. Related considerations led the Board in *South Muskoka* to lament the possibility of a spate of litigation about the issue of RNA bargaining units but to affirm the proposition that an RNA only bargaining unit could be appropriate in circumstances like those before it.

62. The basic task remains - to determine if the bargaining unit requested is viable without causing undue fragmentation or other serious labour relations problems. The Board's jurisprudence has made it clear that the search is not for the most viable or ideal bargaining unit, but for a viable unit. (However, when the Board is dealing with competing applications, preference for the more appropriate unit may well be a factor.) The cases demonstrate that there is a range of viable bargaining units. The outer limits of that range are defined by a number of factors which include the history of the industry, size of the proposed unit in relation to the whole operation (See *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250 at para. 20) as well as the absolute number of units (See *Ryerson Board of Governors of Polytechnical Institute*, cited above at para. 22).

63. One of the constituent elements of viability is sufficient community of interest to bargain together effectively. We are convinced that on the facts of the case before us, the RNA's have demonstrated sufficient community of interest in this respect. They are a coherent group in terms of patient care job duties, conditions of employment and professional qualification and responsibilities. They all work on the same nursing unit with the same type of supervision. As a proportion of the hospital employees, they are a group of significant size. That the alternatives proposed by the employer would encompass larger proportions of the workforce does not turn the RNA group into one that lacks viability, either in terms of collective bargaining goals or number of employees. Thus, we have concluded that on the first prong of the test in *Hospital for Sick Children*, cited above, the requested unit is acceptable, i.e. it is a sufficiently viable unit of employees to bargain together.

64. Many of the employer's arguments related to the fact that the RNA's share a community of interest with employees who would fall into one of their proposed service or paramedical bargaining units. This was part of the focus of its evidence of employment of people with RNA qualifications in other classifications in the hospital. (This evidence was also directed at the area of labour relations problems which would be created by the unit proposed, which will be dealt with below.) We cannot disagree with the assertion that the RNA's also share a community of interest with employees in these other units. However, that does not detract from the fact that the RNA's also have a community of interest among themselves as a group as acknowledged in all of the recent decisions on RNA bargaining units, including *Strathroy-Middlesex*. The main thrust of the employer's objection is the contention that the community of interest of this group, like any group

described by classification, is too narrow to prevent serious labour relations problems. We will deal with these concerns below.

65. We turn then to the second prong of the Sick Children's formulation - whether the granting of this unit would cause serious labour relations problems for the employer. The principal objection by the employer relates to fragmentation. As set out above, the employer says that RNA-only units contribute to a resurgence of fragmentation in the hospital sector that had been halted by the Board's approach in *Stratford General Hospital*. It is useful to note that although we are using the formulation from the *Hospital for Sick Children*, as has much of the bargaining unit jurisprudence since 1985, fragmentation was not the main issue in that case. It was clear that the disputed classifications would be assigned to one bargaining unit or the other, rather than potentially creating an "extra" unit in an already fragmented sector, as it is argued will be the undesirable result of granting the applicant's proposed unit in this case. The main issue for the Board in *Hospital for Sick Children* was how elastic the boundaries of interfacing bargaining units were. The Board concluded that in the margins between bargaining units, certain classifications could comfortably fit in more than one bargaining unit.

66. In considering the issue of fragmentation within the context of this application, it is useful to state what may be obvious: what amounts to undue (the kind that creates serious labour relations problems) fragmentation varies considerably depending on the history and context of both the specific parties and the industry of which they are a part. Even within the hospital sector, a particular objective will narrow or widen observers' tolerance for numbers of bargaining units. For instance, the 1974 report of the Johnston Hospital Inquiry Commission, which was charged, among other issues, with considering the viability of central bargaining, recommended three standard bargaining units in the hospital sector - lower than the number of bargaining units typically found in hospitals certified by this Board, both before the report and during the nearly twenty years since its release. The Board's decision in *Stratford General Hospital*, which considered appropriateness in the context of competing applications for certification, and in *Hospital for Sick Children*, resulted in the likelihood of 4 to 5 bargaining units in the hospital sector (not counting separate full-time and part-time units within those groupings). In the United States, up to eight units, even in small hospitals, is considered acceptable, and in Québec numerous bargaining units may be found in hospitals. In industries whose experience is formed from close association with craft unions, tolerance of several bargaining units is higher, whereas in many industrial plants, more than one bargaining unit might be considered unusual. See *Ottawa Citizen*, [1987] August 1098 and the cases referred to therein.

67. Much of the hospital's submission on fragmentation was in fact a request that we take this opportunity to assist in the management of the hospital sector to further the goal of provincial bargaining. At present provincial bargaining is entirely voluntary, and is conducted by a central bargaining team for the participating hospitals in separate sets of negotiations with central negotiating teams from each of a number of unions, including SEIU, ONA and CUPE.

68. It follows from the employer's argument (and the Johnston Commission Report) that there are at least two elements of the structure of bargaining units which might facilitate central bargaining. One is a smaller absolute number of bargaining units per employer, and the other is a smaller number of bargaining agents across the hospital sector. We do not consider the latter aspect an appropriate consideration in shaping a bargaining unit, because it is incompatible with recognizing the employees' right to choose their own bargaining agent expressed in section 3 above, and now given more prominence in section 2.1 of the Bill 40 amendments. (See also the comments of the Board in *Stratford General Hospital* at para. 13 to the effect that the choice of a bargaining unit should not focus on the choice of bargaining agent.)

69. The former consideration, a smaller number of bargaining units, is largely subsumed in the Board's normal balancing of interests, including its aversion to fragmentation. On its own it is not particularly helpful in resolving this dispute, since it does not speak to which bargaining units should form the smaller number, just that there should be an absolute limit at some small figure. A desire for a particular selection of types of units within the small number of units speaks to the effect of fashioning units in one workplace on the labour relations structure of a particular sector. It also grows out of recognition of the reliance interest of parties in the community which is a by-product of the predictability that "standard bargaining units" provide.

70. Having considered these aspects of the problem, we are of the view that to raise considerations of facilitating the many other parties in this industry in negotiating provincially to the level of a determining factor in any given case would be to unduly hamper the Board's flexibility in dealing with the particular parties before it. As well, the fact that there are only 16 hospitals left out of approximately 220 in the province where there is no service workers bargaining unit diminishes the field of potential impact at this stage in the history of provincial bargaining. Thus we have not given the argument about provincial bargaining the weight the hospital urged upon us, but have considered it as part of the general argument against fragmentation.

71. Turning back to the specific parties before us, we have a workplace which had no bargaining units in place at the time of hearing (but has since acquired one). Where there is a relatively unorganized context such as this, the Board has a freer hand to shape the bargaining unit in a manner that combats fragmentation. However, at such a stage, whether or not fragmentation will occur is dependent on whether or not other employee groups ever organize. Thus, there is an irreducible element of speculation in evaluating the probable effects of fragmentation. We do not have any empirical evidence before us such as the U.S. study mentioned in *South Muskoka* at paragraph 12, to the effect that health care workers organize no more frequently in facilities where some workers engage in collective bargaining than they do in facilities where no bargaining units have been represented. Accordingly, we must rely on general principles in evaluating this area of the case. It remains a possibility that all the other employees will want to organize, that none of them will, or that some of them will.

72. The main spectre of undue fragmentation resulting from further organization of the hospital, other than the effects on provincial bargaining dealt with above, is the fear that a further endorsement of an RNA bargaining unit will be taken by various of the groups in the paramedical field, with much smaller numbers than the RNA's, as a signal that they too should be entitled to their own bargaining unit. As mentioned at paragraph 48 of *Mississauga Hospital*, however, there is no indication that the multiplicity of classifications contained in the typical paramedical bargaining unit face the same historical anomaly as the RNA's.

73. Besides not facing the same historical anomaly as RNA's, the paramedical unit has a fairly recent and specific history before the Board, as seen in *Stratford General Hospital and Hospital for Sick Children*, cited above, which indicates that generally groups identified only by their professional qualification will not be considered appropriate. In the same vein, none of the sub-groups in the paramedical area are likely to have the bulk - a large proportion of the total workforce - that RNA's have in the hospitals which have been dealt with in cases before the Board thus far, a major contributing factor to their viability as a bargaining unit.

74. We agree with the previous panels that growing professionalization per se is not reason enough to warrant a separate bargaining unit. This element of the Board's jurisprudence has not changed since *Stratford General Hospital*. We see the new *Health Professions Regulation Act* as another milestone in the process of professionalization of various work groups described in that

case, and not something that greatly alters our view of paramedical bargaining units, nor something we are prepared to assume will produce increased efforts to organize separate units.

75. In *Mississauga Hospital* and *South Muskoka*, the Board was not persuaded that undue fragmentation would result from allowing an RNA-only bargaining unit although both decisions express reservations on the point. In *Mississauga Hospital*, this was influenced by the fact that the hospital had a history of dealing with the RNA's as a group on matters related to terms and conditions of employment. In *South Muskoka*, the Board found that the facts were sufficiently similar to those in *Mississauga Hospital* that the result should be the same. In *Strathroy-Middlesex*, the Board noted that some of the concerns related to fragmentation are diminished in the hospital sector because work stoppages are illegal at any time and did not consider the increased costs of bargaining with an extra unit sufficient in themselves to outweigh the rights of employees to be represented by the bargaining agent of their choice. At the same time, the Board there accepted as do we, the general proposition that undue fragmentation is not desirable and remarked on the effect of "craft-like" or classification bargaining units in this area.

76. The aspect of fragmentation which was mentioned most prominently in *Strathroy-Middlesex* was its effect upon job mobility and opportunities to perform specific work functions. The Board was persuaded in that case that the overlap in functions and imprecision in the outline of the bargaining unit made an RNA-only unit inappropriate in that workplace. The fact that circumstances where RNA's worked regularly and consistently both inside and outside the proposed bargaining unit, the Board felt that the balance weighed against the RNA's request. The decision does not indicate how regularly and consistently the state of affairs existed. It is clear that the barriers to mobility into the RNA classification have a lot to do with externally imposed registration requirements. Mobility out of the unit into the RN unit is structurally circumscribed for the same reasons. In the situation before us, mobility out of the unit into other classifications will not likely be further limited unless and until there is further union organization in the hospital and only if collective bargaining is not successful in dealing with the hospital's concerns.

77. There are three situations in this hospital where RNA's work both inside and outside the proposed bargaining unit: relief work, the industry testing work done by one RNA four hours a week, and the RNA who job shares her full-time RNA job and also works part-time in CSR and x-ray. We are not of the view that these instances represent motion in and out of the RNA classification to an extent which should be considered a serious labour relations problem in this case. In particular, the category of relief work by employees in other bargaining units is one that is very amenable to resolution at the bargaining table, and not the type of serious labour relations problem which would lead us to deny the unit. The issue of part-time work, some of which would fall inside and some outside the proposed bargaining unit, is similar and does not appear to be likely to create serious labour relations problems, limited as it is to one person picking up extra hours in work which is not as physically demanding as regular RNA work. Similarly, the fact that an RNA also does industry testing one morning a week does not appear a very significant factor. Even put together, these facts do not appear to us to create very serious problems. They do not create the kind of integration of work mentioned in *Board of Governors for Ryerson Polytechnical Institute*, *supra*, as creating the greatest potential for mischief, i.e. where the work performed in the two proposed units is integrated. The fact that individuals are capable of doing various tasks which may be organized into different bargaining units does not create integration of work. The examples of the use of RNA qualification in jobs not considered RNA work are not like the situation in *Kidd Creek Mines*, *supra*, for instance, where a number of tradespeople worked together side by side to solve maintenance problems. The x-ray technician, for example, may on occasion deal with the same patient, but quite separately from the work the RNA does on the nursing ward.

78. The situations described above also indicate, in the employer's view, a similarity of skills between RNA's and employees who would be included in the service unit, something the Board said in *Mississauga Hospital* had not been demonstrated in that case. The evidence before us does not disclose that the similarity in skills relates to core functions of these classifications, a factor which might give more concern. (There may be such a concern with RN's, but they now have their own unit in any event.) We do not view the similarity of skills shown by the evidence as more than the irreducible fact that there is necessarily some overlap in skills in any job involved in patient care. No one was proposing a bargaining unit limited to employees involved in patient care.

79. The related matters of overlapping functions with other classifications is also argued as a serious labour relations problem for the employer. This is seen as a problem both in respect of potential jurisdictional disputes and in the area referred to in *Strathroy-Middlesex* as imprecision in the outline of the bargaining unit. The potential for jurisdictional disputes is undoubtedly present. However, it would appear that the greatest danger is with the RN unit, which is something present throughout the hospital industry in Ontario and not capable of resolution in this dispute. We observe that placement of the RNA's in either of the respondent's proposed alternative service or paramedical units would not eliminate the potential for jurisdictional disputes. Jurisdictional disputes are possible between RNA's and classifications which would fall outside of either or both of the service and paramedical bargaining units, e.g. ward clerk, central supply attendant and x-ray. Indeed, there is no placement of the RNA's proposed to us which eliminates the possibility of jurisdictional disputes. Since there are no orderlies in this hospital, there is not the danger of jurisdictional disputes with that classification, something mentioned in *Mississauga Hospital*. The aspect of imprecision in the outline of the bargaining unit is not present here as it was in *Strathroy-Middlesex*; there are no anomalies such as people sought to be represented who did not have the RNA qualification.

80. Despite the above, it remains true that a separate unit of RNA's does nothing to reduce the potential for jurisdictional disputes, and this is a matter of concern. The Board's recent experience demonstrates that the opportunities for jurisdictional disputes in the hospital sector in this era of restructuring are real. It is also true, as remarked in the earlier decisions on this subject, that the most serious potential outcome of jurisdictional disputes - work stoppages - are not legal in this sector. This diminishes the concern to a certain extent. Jurisdictional disputes have nonetheless caused a great deal of expensive and demoralizing litigation in the Board's experience. Although there is room for hope that the new jurisdictional dispute processes created by Bill 40 will be able to contain this problem, the spectre of jurisdictional disputes is the most significant of the matters raised by the employer. However, we are not convinced that this is any larger a problem than in the fact situations underlying *South Muskoka* and *Mississauga Hospital* decisions. Those decisions, faced with essentially the same arguments, very recently in the history of the Board, did not find the potential for jurisdictional disputes to be sufficient reason to deny the RNA unit. With the exception of the lack of orderlies in this hospital, the cases are indistinguishable on facts relevant to the issue of potential for jurisdictional disputes. The lack of orderlies is a factor which reduces the risk somewhat in this hospital.

81. Another aspect of the facts before us, argued to be problematic overlap in functions, relates to the fact that the RNA qualification is required or preferred for a number of other classifications. Central to this and other hospitals' preference, we infer, is the fact that the RNA qualification is generally very useful for working in the hospital. It provides knowledge of relations with and care of patients which would likely be an asset to any hospital employee. This aspect of the use of the RNA qualification is in our view more supportive of the concept that the alternative bargaining units proposed might also be appropriate, an idea endorsed by all the recent cases on RNA units, rather than a barrier to granting this bargaining unit.

82. We have considered *The Municipality of Metropolitan Toronto*, cited above, referred to by the employer. This dealt with a situation of intermingling after a sale of a business. The union wanted to preserve a bargaining unit consisting of a number of departments of nurses, which the Board found would have created an island of nurses within the nursing division, creating various scheduling and other administrative problems for the employer. This is not the case on the facts before us.

83. The employer also emphasized in argument that this hospital is particularly small and that any impediments to mobility will create great difficulties. As well, it is argued that the additional costs of bargaining with an extra bargaining unit will have a proportionally greater effect because of the size of the employer. To the extent that the legislation speaks to this issue it says only that a bargaining unit may be made up of as little as two employees. While a small hospital undoubtedly has its particular problems, we are not persuaded that this factor should be determinative of the appropriate bargaining unit, given the many small organized workplaces in the province.

84. The employer also argues that the Bill 40 amendments contain indications of legislative intent to discourage fragmentation which the Board should consider as weighing against granting the unit sought. We agree that the portions of the amendments relating to combination of bargaining units and direction against separate full and part-time units are expressions of legislative intent to reduce fragmentation where different units may be represented by the same bargaining agent. As well, RNA's are not among the professions listed in the new section 6(4) of the Act which are deemed to be capable of creating units of employees appropriate for collective bargaining. However, the amendments also contain indications that the legislature intended to facilitate organizing and to protect the right of employees to be represented by a trade union of their choice. The policy considerations involved in reducing fragmentation at the stage of combining bargaining units are also not necessarily the same as at the (often earlier) stage of organizing, where the desire to limit fragmentation must be balanced against equally valid considerations related to access to bargaining and choice of bargaining agent. Thus we find that the Bill 40 amendments contain elements favouring each of the positions before us, and therefore are not of particular assistance in resolving the instant dispute.

85. Thus, we have considered the various aspects considered to be serious labour relations problems by the employer in this case. We do not consider any of them to be more extensive than the ones considered by the Board in *Mississauga Hospital* and *South Muskoka*, where they were not found sufficiently serious to deny the unit applied for. We do not find that there is the imprecision in the definition of the bargaining unit found in *Strathroy-Middlesex* or such frequent interchange with other classifications that the unit should be denied. In sum, we find the facts sufficiently close to those in *Mississauga Hospital* and *South Muskoka* that the unit applied for should be granted as we are not persuaded that a different approach is warranted in this case.

86. Although the decisions in *Mississauga Hospital* and *South Muskoka* are fact-specific, the constellation of facts in those cases is not necessarily particularly unusual in the hospital sector, as evidenced by the facts of this case and those in *Wingham General Hospital*. The tenor of the decisions indicate that the Board was willing to consider new options - in effect to take a new look at a bargaining unit historically considered inappropriate. To that extent the decisions represent, as we said earlier, a departure from the Board's usual rejection of department and classification based bargaining units. However, it is our view that the departure is based on extremely specific circumstances - limited to the situation of historical anomaly described in these cases - of difficulty of finding an appropriate fit for the RNA's in the traditional service unit in light of the evolution of their role in the hospital sector in the direction of the RN's and is not a rejection of the validity of the

Board's usual approach. Given those particular circumstances, the consideration of section 3 rights (*Mississauga Hospital*, para. 48 and *South Muskoka* para. 16) tips the balance to allowing the RNA unit to be found to be an appropriate bargaining unit despite the potential problems set out by the employer in this case and in the previous cases.

87. For all the above reasons, we find the unit applied for to be the appropriate bargaining unit for the purposes of this application.

88. As there were no other issues outstanding and the applicant has membership support of more than fifty-five per cent of the employees in the bargaining unit, a certificate will issue to the applicant.

DECISION OF BOARD MEMBER JAMES A. RONSON; September 20, 1993

1. I cannot agree with the reasoning and decision of the majority. The reasons for the dissent of Mr. W. Correll in *The Mississauga Hospital* case, *supra*, are applicable in their entirety to the facts before us. I cannot improve upon them, except to comment that a recent addition to our Act (section 7) clearly points the direction which the Legislature wishes this Board to take with respect to fragmentation and multiple bargaining units (also see *Strathroy Middlesex General Hospital*, *supra*).

2. I would dismiss this application for the following reasons:

(a) It sets the groundwork for undue fragmentation of the working relationship between the employer and all of its employees; and

(b) It deviates from long established policies of the Board in the health care sector.

1034-93-OH Edward McGimpsey, Applicant v. Guelph Transportation Commission, Responding Party

Discharge - Health and Safety - Employee alleging that he was discharged contrary to Occupational Health and Safety Act - Employer making preliminary motion that application be dismissed because applicant elected to have discharge dealt with through arbitration under provisions of collective agreement - Employer's preliminary motion upheld - Application dismissed

BEFORE: Louisa M. Davie, Vice-Chair, and Board Members J. A. Ronson and C. McDonald.

APPEARANCES: John M. Rattray and Edward McGimpsey for the applicant; Michael G. Horan and James Robinson for the responding party.

DECISION OF THE BOARD; September 14, 1993

This matter came on for hearing before this panel of the Board on Tuesday, September 14, 1993. At that time the Board rendered the following unanimous oral ruling:

1. This is a complaint filed pursuant to the *Occupational Health and Safety Act* ("OHSA"). The complainant, Mr. McGimpsey, asserts that he was discharged contrary to the provisions of sec-

tion 50(1) of the OHSA. The responding party Guelph Transportation Commission (hereinafter referred to as "the employer") has made a preliminary motion that the Board dismiss this complaint because Mr. McGimpsey has elected to have the matter of his discharge dealt with through arbitration under the provisions of a collective agreement. The employer alleges that as a result of that election, and pursuant to section 50(2), Mr. McGimpsey is precluded from proceeding before this Board.

2. The facts necessary for us to deal with this preliminary motion are not in dispute. There is a dispute between the parties with respect to the nature or effect of a settlement purportedly entered into between the employer, Mr. McGimpsey and his trade union. In our view, that dispute is not relevant to our determination with respect to this preliminary motion.

3. The facts agreed upon may be summarized as follows:

On January 8, 1993 Mr. McGimpsey's employment was terminated. On that day a grievance with respect to Mr. McGimpsey's discharge was filed. On January 13, 1993 that grievance went to the last step of the grievance procedure. It remained unresolved.

On January 15, 1993 the trade union, Mr. McGimpsey and the employer signed a memorandum of settlement resolving the grievance.

On February 22, 1993 pursuant to section 46 of the *Labour Relations Act* the trade union applied to have the grievance arbitrated. The arbitration was scheduled for March 18, 1993.

Prior to the scheduled arbitration hearing the employer raised an objection that the matter had been settled. Counsel for the employer asked that the arbitrator deal with that issue as a preliminary matter by teleconference.

On or about March 17 a teleconference was held amongst the union representative, employer's counsel, and the arbitrator. At that time the union asked that the arbitration be adjourned. The arbitrator granted that request and the arbitration has been adjourned *sine die*.

Thereafter employer counsel wrote to the arbitrator confirming the adjournment *sine die* and indicating that if the matter proceeded, the issues relating to the settlement would be dealt with first.

In or about April 1993 Mr. McGimpsey filed a complaint with the Workers Compensation Board asserting his dismissal was contrary to section 54 of the *Workers Compensation Act*.

This complaint under the OHSA was filed with the Board on June 22, 1993.

On July 8, September 2 and September 3 a hearing into Mr. McGimpsey's complaint under the *Workers Compensation Act* was conducted by the reinstatement officer under the provisions of the *Workers Compensation Act*. No decision in that matter has been issued.

4. In his able submissions to the Board, counsel for Mr. McGimpsey did not disagree that under the statutory provisions a worker (in this case Mr. McGimpsey) must make an election.

5. Counsel argued that in the circumstances before us, Mr. McGimpsey had *not* made such an election. He submitted that indeed Mr. McGimpsey could not have made that election because neither the union nor Mr. McGimpsey was aware of the OHSA reprisal aspect of this discharge until after the grievance had been filed and the arbitration was adjourned.

6. Counsel referred to *Brunswick Mining and Smelting Corporation Limited v. Adelard Savoie* (1991) 6 C.O.H.S.C. 10, a decision of the New Brunswick Court of Appeal, in support of this assertion.

7. Counsel for Mr. McGimpsey distinguished the Board's decisions in *Inco Metals*, [1982] OLRB Rep. May 681, *The Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283, *Zalev Brothers*, [1989] OLRB Rep. July 810 and *Scarborough Hospital*, [1988] OLRB Rep. Sept. 981 on the basis of what he termed "the temporal" facts of this case. He submitted that at all relevant times Mr. McGimpsey, being unaware of the OHSA issue, and being unaware that such an issue was a "live" issue, could not have made the election referred to in section 50(2) of the OHSA. As such, the "matter" which is being raised in this application, namely the OHSA issues, is not the "matter" which has been raised in any other proceeding or before another adjudicator or in any other forum. This is therefore not a case of trying to ride two horses.

8. We do not agree.

9. We have determined to grant the employer's preliminary motion and dismiss this complaint. In our view, Mr. McGimpsey has elected to have the propriety of his discharge adjudicated through the arbitration process under the terms of his collective agreement. The "matter" which is already before the arbitrator (and with which in our view the arbitrator is now seized) and the "matter" which Mr. McGimpsey seeks to raise before us is his discharge. Having elected to proceed in one forum, Mr. McGimpsey cannot change horses midstream and bring the matter of his discharge before this Board. The Act clearly provides for the "either/or" proposition which counsel for the employer urges upon us.

10. We find that the New Brunswick Court of Appeal case is not applicable to the facts and circumstances before us. That case deals with the efficacy or enforceability of a release and not with the issue of the statutorily-required "election". In our view, the decisions of the Board in *Inco Metals*, *supra*, *The Municipality of Metropolitan Toronto*, *supra*, *Zalev Brothers*, *supra* and *Scarborough Hospital*, *supra* are not distinguishable. We accept and adopt the reasons and policy concerns underlying these decisions and find them applicable to the facts before us.

11. For all of these reasons, we grant the employer's motion and dismiss this case.

1240-93-M; 1241-93-M Association des Employés d'Ottawa-Carleton (Employés de bureau, de secrétariat et employés techniques), Applicant v. **La Section catholique du Conseil scolaire de langue française d'Ottawa-Carleton**, Responding Party; Association des Employés d'Ottawa-Carleton (Préposés à l'entretien et à la conciergerie), Applicant v. **Le Conseil plénier du conseil scolaire de langue française d'Ottawa-Carleton**, Responding Party

Change in Working Conditions - Interim Relief - Remedies - Unfair Labour Practice - Union alleging that school board employers' planned measures regarding taking of vacations breaching statutory freeze - Unions asking Board to make interim order directing employers to permit employees to choose when they will take vacation during July and August - Union not relying on any potential harm beyond difficulty in remedy to individual employees - Union not asserting any effect on wider labour relations context between parties - In absence of broader labour relations considerations, balance of harm not weighing in favour of making interim order - Applications dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *D. A. MacDonald* and *A. R. Foucault*.

APPEARANCES: *James G. Cameron* and *Gerard Poirier* for the applicant; *Graham Clarke*, *Alain Fortin* and *Robert Lefebvre* for the responding parties.

DECISION OF S. LIANG, VICE-CHAIR AND BOARD MEMBER D. A. MACDONALD:
September 22, 1993.

1. These are related applications for interim relief made under section 92.1 of the *Labour Relations Act*. The Board held a hearing on July 16, 1993 for the purpose of hearing the representations of the parties with respect to the matters raised by the applications. After reviewing the materials filed and hearing the representations of the parties, the majority of the panel, Mr. Fouchault dissenting, denied the orders sought by endorsement dated July 20, 1993. We now provide our reasons for that ruling.

2. For ease of exposition, the applicant will be referred to herein as “the Association”. The responding parties will be referred to as “the Catholic Section” and “the Full Board”.

3. These two applications are related to two other applications made pursuant to the provisions of section 91 of the *Labour Relations Act*. In the applications under section 91, the applicant alleges that the responding parties have violated section 81 of the Act by implementing certain measures regarding the taking of vacations by the employees in the bargaining units represented by the Association. As well, the Association asserts that the imposition of a week of vacation on certain employees of the Catholic Section constitutes an unlawful lock-out.

4. The two bargaining units which are the subject of this application are a group of office, clerical and technical employees (employed by the Catholic Section) and maintenance and custodial employees (employed by the Full Board). The last collective agreements applying to these groups were effective from January 1, 1991 to December 31, 1992. Notice to bargain was sent to the responding parties on December 10, 1992 and the parties are currently in negotiations with respect to new collective agreements for the two groups.

5. Many of the provisions of the two collective agreements are the same or very similar. With respect to annual leave, the agreements state:

3.3.5 Utilisation des congés annuels

- a) Les employés prennent normalement leurs congés annuels durant les mois de juillet et août. Dans les cas où les écoles ou les services sont fermés pendant les vacances de Noël et les vacances d'hiver, les absences d'employés survenant au cours des périodes susmentionnées pendant les jours qui ne sont pas des jours fériés désignés sont portées au débit du compte des congés annuels ou autres congés payés des employés.
 - b) Sous réserve des exigences du Service ou du lieu de travail et en autant que la Section n'ait pas à embaucher du personnel ou à défrayer des coûts supplémentaires en raison de l'absence de l'employé, ce dernier peut prendre ses vacances durant l'année scolaire.
 - c) Aucune déduction de crédits de congés annuels n'est appliquée lors d'un congé 2i férié.
- [office, clerical and technical]

3.3.5 Utilisation des congés annuels

- a) Les employés prennent normalement leurs congés annuels durant les mois de **juillet et août**.
- b)i) Sous réserve des exigences du Service ou du lieu de travail et en autant que la Section n'ait pas à embaucher du personnel ou à défrayer des coûts supplémentaires en raison de l'absence de l'employé, ce dernier peut prendre ses vacances à une autre période que celle de juillet et août.

- ii) Une telle demande doit être présentée au Conseil:
 - au moins une semaine à l'avance lorsqu'il s'agit d'une demande de congé de trois (3) jours ou moins;
 - au moins un (1) mois à l'avance lorsqu'il s'agit d'une demande de congé de plus de trois (3) jours.
 - c) Aucune déduction de crédits de congés annuels n'est appliquée lors d'un congé férié.
- [maintenance and custodial]

6. On April 26, 1993, the Association was advised with respect to the office, clerical and technical bargaining unit that the Catholic Section intended to direct employees to use the first week of August as part of their annual leave, as part of a general shutdown. The Association took the position that this measure was contrary to the collective agreement. On May 11, the Catholic Section sent a general memo to its employees indicating that all personnel would be considered on vacation during the first week of August (August 3, 4, 5 and 6). The Association met with the Catholic Section on May 19 and, among other things, took the position that such a measure constituted a violation of section 81 of the *Labour Relations Act*.

7. With respect to the maintenance and custodial employees, the Full Board requested on May 17, 1993 that employees indicate their vacation preferences for the months of June, July and August. When the Full Board confirmed the vacation schedule, 13 out of 56 employees who had requested vacation during the last week of August were denied this week.

8. Both groups of employees were also told that they were expected to use all of their annual leave before the end of the calendar year.

9. In these requests for interim relief, the Association requests that the Board order the Catholic Section not to cease operations during any specific period during the months of July and August and order the Catholic Section and the Full Board to administer vacation leave entitlement pursuant to its understanding of the collective agreement, so as to permit employees to choose when they will take vacation during July and August.

10. The Association alleges that under both collective agreements, employees are entitled to take their annual holidays any time during the months of July and August. Under the terms of these agreements, employees have an unfettered right, during the months of July and August, to choose their vacation times. The decision to refuse some employees the right to take holidays during a specific week, and the decision to require employees to take their holidays during a specific week, violate article 3.3.5 of the collective agreements. As such, these measures constitute a violation of section 81 of the Act in that they change terms and conditions of employment during the period in which the terms and conditions of the expired collective agreement continue.

11. In addition, the Association alleges that the decision by the Catholic Section to cease certain operations during the first week of August and force employees to take this week as a vacation week constitutes a lock-out contrary to the provisions of section 74 of the Act.

12. In support of the request for interim relief, the declaration filed by the Association states that it is unlikely that the Board will adjudicate on the merits of these complaints before the time in which these measures will be implemented. Any effective remedy given after the fact will be both disruptive and expensive. In oral representations, counsel for the Association also referred to the direct, personal consequences of these measures on employees' vacations, and the disruptions to family holidays which will result from the responding parties' actions. He also submitted

that, in reality, if the complaints are upheld, it will be impossible to place employees in the position they would have been in but for the violations of the Act.

13. Counsel for the Catholic Section and the Full Board disputes that the Association has made out even an arguable case on the materials filed. In his submission, there is nothing in the collective agreements which prohibit these employers from taking the disputed measures. There is nothing in the language of the agreements relied on by the Association which gives employees the absolute right to determine their vacation schedule during the months of July and August. Further, counsel states that with respect to the Full Board, the matter of vacation scheduling has always been subject to the final approval of the Full Board. The Association has never complained about this practice in previous years.

14. Further, counsel submits that the prejudice to the responding parties far outweighs the prejudice to the Association. An interim order would give the Association a total victory in the dispute. If the employers are vindicated by the finding on the merits, it will be too late, since they will already have been prevented from doing precisely what they sought to do.

15. The responding parties dispute that there has been a lock-out by the Catholic Section. Among other things, there is absolutely no evidence that there was a suspension of work motivated by an attempt to compel employees to refrain from exercising any rights or privileges under the Act or to agree to provisions or changes in provisions respecting terms or conditions of employment.

16. Further, counsel for the responding parties states that the delay by the Association ought to weigh against the relief sought. Although the Association has known of the matters in dispute since at least the beginning of May, it took until June 18 to file a complaint before the Board, and then until July 12 to file the request for interim relief. The lack of expedition suggests a lack of urgency. In addition, since the dispute between the parties essentially centres on a dispute over the interpretation of the collective agreements, the Association could have sought expedited arbitration of the issues and had them determined before this date.

17. On the issue of delay, the Association does not deny that it has known of these matters for several months before the applications for interim relief were filed. Counsel submits that since it asserts a breach of statutory rights, the Association is not compelled to take these matters to arbitration but has the right to bring them before the Board. As well, the allegation of an illegal lock-out is not a matter which an arbitrator could deal with. Further, even if the issues had been referred to arbitration, in the Association's experience, the parties would have been unlikely to receive a decision before these events.

18. The parties referred the panel to the following cases: *Metropolitan Toronto Apartment Builders Association*, [1993] OLRB Rep. March 219; *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 242; *Loeb Highland*, [1993] OLRB Rep. March 197; *Loeb IGA Highland*, [1993] OLRB Rep. March 208; *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. Apr. 358; *Grey Owen Sound Joint Homes for the Aged (Grey-Owen Lodge)*, [1983] OLRB Rep. Apr. 522; *J. Lewis Humphreys*, [1983] OLRB Rep. Apr. 530; *Ottawa Civic Hospital*, [1986] OLRB Rep. June 812; *Trim Trends Canada Limited*, [1987] OLRB Rep. Apr. 623 and *Anderson's City Farm Valu-Mart*, [1987] OLRB Rep. Jan. 1.

19. As indicated at the outset, after hearing the representations of the parties and reviewing the materials filed, the majority of this panel dismissed the requests for interim relief.

20. Over the course of the past number of months, the Board has heard a number of

requests under section 92.1 and has developed certain principles which it finds useful to apply in assessing the merits of requests for interim relief. These principles have been elaborated in some of the cases cited above. The Board has stated that there are essentially two elements in its determinations under section 92.1. The first element requires the Board to assess, in a preliminary way and without making a determination on the merits, the apparent existence of an arguable case.

21. For the purposes of our determination, we are prepared to accept that the Association has established that it has an arguable case on at least some of the issues raised. We have serious doubts as to whether it has established an arguable case with respect to the lock-out allegations, given the complete absence of any indication that the imposition of a week's vacation was taken with a view to compel employees to "refrain from exercising any rights or privileges under this Act" or to "agree to provisions or changes in provisions respecting terms or conditions of employment", as set out in the definition of lockout under the Act.

22. Our decision to dismiss these requests turns on the second element of the Board's determination in this type of case, involving an assessment of the relative harm which may result from a decision to grant or not grant interim relief. In the case before us, the harm asserted by the Association in the event the Board refuses the relief relates purely to the remedial outcomes of these disputes, as they affect individual employees. It is said that if the Association succeeds on the merits, it will be difficult if not impossible to fully compensate the employees who have been denied their choice of vacation. It is suggested that it is more efficient and cost-effective to prohibit these measures at this point, than to find ways to compensate for them later.

23. We agree that full compensation is an ideal which is sometimes difficult to attain. In many cases, it is indeed a challenge to find a "make whole" remedy that is meaningful and complete. Sometimes, the difficulty arises where the Board must assess the amount of damages which would compensate for non-monetary loss, as might be the case here. Nevertheless, the Board has often indicated that the difficulty of assessing damages should not be a deterrent to the search for a "make whole" remedy. It has endorsed notions such as "loss of opportunity" as a means of remedying non-monetary loss.

24. Therefore, we cannot say that it would be an extraordinary or impracticable task to assess and award compensation in the event the Association is successful on the merits of the complaint. We do, however, agree that it might be difficult.

25. On the other hand, it is hard to deny that granting the orders sought would indeed be the "total victory" in these disputes. To the extent that the complaints are directed at two specific measures which will be carried out in the first and last weeks of August, the prohibition of these measures in effect decides the issues in favour of the Association. If these orders are granted and the Association subsequently loses on the merits of the complaints, it appears unlikely that the Catholic Section and the Full Board could institute duplicate measures once the school year has started. We do not intend to suggest that it will never be appropriate to grant interim relief even in these circumstances. However, unless the harm that might result from a refusal of the order is at least equally compelling, and is related to important public policy or labour relations considerations, we are reluctant to order interim relief where it essentially decides the matter in favour of one party.

26. In the case before us, the Association has not relied on any potential harm beyond the difficulty in remedy to the individual employees. It has not asserted that the actions by these employers have any effect, for instance, on the wider labour relations context between these parties who are at the present negotiating for the renewal of their collective agreements. In the

absence of such broader labour relations considerations, we do not find the balance of harm in the case before us to favour the remedies sought.

27. For these reasons, the Board dismissed these applications. Given our findings, we need not deal with other arguments advanced by the parties.

DECISION OF BOARD MEMBER A. FOUCAULT: September 22, 1993.

I dissent.

3309-90-R Brewery, Malt & Soft Drink Workers, Local 304, Applicant v. MDS Health Group Limited, Responding Party

Bargaining Unit - Certification - Employer in business of providing medical testing and laboratory services - Employer operating 26 locations within Metropolitan Toronto - Union making certification application in respect of employees working at single location - Single location unit held not an appropriate bargaining unit - Application dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *D. A. Paterson*.

APPEARANCES: *J. Cameron Nelson* for the applicant; *David Corbett*, *T. McMann* and *Sandra Lemon* for the responding party.

DECISION OF THE BOARD; September 2, 1993

I

1. This is an application for certification.
2. The parties are agreed that the application is timely, and that the applicant is a trade union within the meaning of the Act.
3. The parties are not agreed on the description of the unit(s) of the company's employees appropriate for collective bargaining.
4. The union is seeking to represent employees working at 25 Leonard Avenue, which is one of a number of MDS locations in Metropolitan Toronto. The union proposes two bargaining units of those employees: one comprising all full-time employees working at 25 Leonard Avenue, and a second comprising all part-time employees (i.e. less than twenty-four hours per week) working at 25 Leonard Avenue. The union does not seek to represent employees working at any other location.
5. The union submits that its proposed units are "appropriate" for collective bargaining, even though there may well be broader employee groupings which would also be appropriate. The union urges the Board to accept its proposed "site-specific" units so that it can gain a foothold in the company's organization. In the union's submission, ease of organization and employee self-de-

termination should override the employer's concern about fragmentation. The union acknowledges that its proposed units represent a small subdivision of the company's organization and workforce in Metropolitan Toronto. However, the union maintains that it is not required to organize the broadest or most comprehensive bargaining units - only appropriate ones - and, in the union's submission, its two proposed units meet that test.

6. The company replies that the sub-division of its work force proposed by the union is not appropriate for collective bargaining purposes. In the company's submission, the unit(s) of employees appropriate for collective bargaining should encompass all of its employees at its various locations in the Metropolitan Toronto - not just the small group working at 25 Leonard Avenue. A "full-time" and "part-time" distinction may be sustainable on this broader basis, but not within one of a number of similar workplaces. In other words, while the union proposes a full-time unit and a part-time unit confined to a single location, the company proposes a full-time unit and a part-time unit defined on a Metro-wide basis.

7. In the alternative, the company asserts that, at the very least, the bargaining units should encompass the three locations (which includes 25 Leonard Avenue) where workers perform what the company describes as "home-care" functions. This is an administrative sub-division within its organization that has somewhat different work characteristics and might, for that reason, be treated as a group. However, from the company's perspective, this is very much an "alternative" submission, involving bargaining units only slightly more attractive than those proposed by the union. The company's principal position is that orderly collective bargaining demands bargaining units that are Metro-wide. Anything else would produce an unduly fragmented bargaining structure with adverse consequences for the employer and the employees. In the company's submission, geographic location does not provide a sound labour relations basis for subdividing the employer's organization for collective bargaining purposes.

8. The facts are not in dispute.

II

9. MDS Health Group Limited ("MDS") provides medical testing and laboratory services across Canada. It is one of a number of companies that provide such services. The tests are prescribed by physicians, whose patients either visit a convenient MDS location to have the testing done, or make arrangements for an MDS employee to visit them in their homes, or in the institution where the patients reside. MDS has one hundred and forty locations in Ontario.

10. In Metropolitan Toronto, MDS has a main reference laboratory in Etobicoke, together with twenty-six other locations scattered across the municipal area. Every MDS location has, at a minimum, a "specimen collection centre" ("SCC") where patients attend, and specimens are taken by trained phlebotomists. Some SCC locations also have a testing laboratory.

11. Of the twenty-seven MDS locations in Metro, eighteen consist solely of a walk-in SCC, and of these, nine are very small, having only one employee (phlebotomist). Seven locations have both an SCC and a laboratory facility, where specimen analysis is done. Finally, three of the SCC's have a contingent of mobile phlebotomists who make the home visits to which we have already referred. The SCC at 25 Leonard Avenue is one of these. The others are 2425 Dundas Street and 1371 Neilson Road.

12. Attached to this decision and marked "Chart A", is a visual representation of MDS locations throughout Metropolitan Toronto. The chart identifies the street address, the mix of functions or facilities present at each site, and the reporting relationships of the employees working

there. The chart also indicates the geographic proximity of the various locations and, incidentally, shows what the bargaining structure would look like if each location were found to be a separate bargaining unit. Since the nine single-person SCC's could not, in law, be site specific bargaining units (see section 6(1) of the Act), these locations would have to be grouped together, or associated in some fashion with other more populous locations. However, even if the Board were to reject the full-time/part-time distinction urged upon us by *both* parties, the union's proposal could produce a highly fragmented bargaining structure, with well over a dozen bargaining units and possibly many more.

13. As will be seen from the chart, the SCC's are geographically distributed throughout Metropolitan Toronto; moreover, the facilities vary in size and complexity. It is quite common for employees at one site to report to managerial personnel based somewhere else. For example, the mobile phlebotomists at 25 Leonard Avenue report to a supervisor at 2917 Bloor Street, where their work orders originate. The employees in the SCC at 360 College Street (which is two blocks away from 25 Leonard Avenue) also report to 2917 Bloor Street. So do the employees at 2698 Dundas Street. There is one supervisor for these three locations. By contrast, employees at 750 Dundas Street (which is across the street from 25 Leonard Avenue) report to 2425 Bloor Street.

14. The chart illustrates the geographic distribution of MDS locations and their rough proximity to each other, however, as counsel explained, there is nothing particularly significant or valuable about the location itself. An SCC is not a grocery store, a theatre or a factory. The SCC's are situated in their present locations because of favourable lease arrangements. That is why there are two SCC's across the street from one another, and a third SCC only a couple of blocks away. These locations can be, and have been, moved or combined, depending upon the organizational needs of MDS and the economics of the real estate market. As counsel put it: there is no "magic" in a particular location or street address.

15. The network, as a whole, must blanket Metropolitan Toronto, but particular locations and functions are not fixed. For example, at the time the certification application was filed, there was a lab facility at 25 Leonard Avenue which has since been moved elsewhere. The evidence does not disclose whether one of the six existing satellite laboratories was once at 25 Leonard and has been moved to its present location, or, alternatively, whether the lab functions formerly performed at 25 Leonard have been shifted to one or more of the other satellite laboratories and/or the main laboratory in Etobicoke, or whether those lab functions were merely discontinued. For present purposes, it does not matter. The point is: the organization is fluid and flexible.

16. Although there are now seven laboratories in Metropolitan Toronto (including the big one in Etobicoke) not all laboratories are equipped to perform all required testing. A specimen procured in one area of the city will not necessarily be tested at the closest laboratory, and may be tested at more than one lab before the results are transmitted to the recipient. There is a regular flow of work, back and forth, between SCC's and one or more labs - hence the need for a large number of couriers, and the need for telephone co-ordination of the home-care phlebotomists attached to 2425 Bloor Street, 25 Leonard Avenue, and 1371 Neilson Road. The company employs approximately thirty-two couriers to carry samples and related documentation between the SCC's and the various labs.

17. The MDS facilities vary in size from the nine locations with (currently) only one employee, to the main reference laboratory in Etobicoke with approximately two hundred and seventy-five employees. The main lab and office complex employ about two-thirds of the company's employees in Metropolitan Toronto. At 25 Leonard Avenue, there are now approximately twenty employees. The parties have agreed that "for the purposes of the count" there were eighteen full-

time workers and three part-time workers at the time the application was made. The mix of full-time and part-time employees seems to fluctuate somewhat.

18. Apart from the clerical and technical employees in Etobicoke, there are several categories of employees working at the company's twenty-six other locations. Among these are SCC employees called "phlebotomists", who are typically assigned to a specific SCC location to collect specimens from patients who attend at that location. They also collect patient information and prepare specimens for testing at one or more labs. Other phlebotomists ("home-care" or "mobile" phlebotomists) collect the same material from patients in their homes, and, as we have already noted, are associated (currently) with one of three SCC's in Metro Toronto. After the specimens are procured by the phlebotomists either from the patient visiting the SCC or a phlebotomist visiting the patient, phlebotomists transcribe relevant information on a requisition form for the laboratory technologists, and arrange for delivery of the specimens to the appropriate laboratory.

19. The home-care phlebotomists attached to 25 Leonard Avenue can reasonably regard that location as their normal base of operations; however, the testing requisitions which generate their work are actually funnelled through a district co-ordinator at 2917 Bloor Street. Hard copies are sent by courier and are supplemented by verbal instructions if there are changes to be made.

20. It must be emphasized that all phlebotomists have substantially similar skills, qualifications and duties, whether they are regularly stationed at a particular SCC, or alternatively are working "out of" a particular SCC but spending most of their time "on the road". All phlebotomists complete a community college or similar training program in phlebotomy, and associated skills such as electrocardiology. The work of a phlebotomist is the same, wherever s/he does it.

21. According to Sandra Lemon, the supervisor of "home-care", the phlebotomists at 25 Leonard Avenue interact with data entry clerks and sorters who process, package, and label, the sample for shipment to the appropriate location, as well as record any special transportation, location, testing, or reporting information. It is not clear from Ms. Lemon's testimony whether these ancillary personnel are regularly or permanently at 25 Leonard Avenue, or at 2917 Bloor Street where testing requisitions originate, and from which "home-care" duties are administered by a telephone co-ordinator. She testified that "home-care functions" include those of sorters, but not data entry persons; moreover, she said that at the time the application was made, she "borrowed" data entry personnel from Bloor Street, although now they were "her own". This interrelationship of persons and functions is typical of various parts of the organization.

22. The mobile phlebotomist ends his/her day by sorting, planning and routing the collections or testing that s/he is to do the following day. They divide their time between "paper work" duties at their home base (for example, 25 Leonard Avenue) and collection duties on the road. However, there is regular checking by telephone with the home-care co-ordinator to update and revise testing requisitions - which in the case of the mobile phlebotomists attached to 25 Leonard Avenue, means regular checking with 2917 Bloor Street. At the present time, there are thirty-six full-time and part-time mobile phlebotomists based at the three locations noted above. The mobile group is responsible for covering all of Metropolitan Toronto which has been divided into three distinct geographic territories, with a common overall supervisor.

23. Over the past five years home-care phlebotomists have been managed as a unit under one manager or supervisor (currently Sandra Lemon). The supervisor of home-care is located at 2917 Bloor Street. Ms. Lemon visits all locations with some frequency (i.e. at least once a week).

24. All home-care phlebotomists receive the same policy and procedural instructions from the supervisor of home-care who exercises effective managerial authority over them. However, the

SCC phlebotomists may also report to managerial personnel who are off site. The locations are not isolated or independently managed. Performance evaluations, salary increases, recommendations concerning hiring, promotions, termination and granting time off, and so on, are conducted by managerial personnel for their assigned employee group, irrespective of the location in, or from which, the employee works from time to time, or the usual location of the supervisor. The policies and processes are the same.

25. The laboratory staff are employed in six Metro locations in addition to the main lab in Etobicoke. These employees test the specimens collected by the phlebotomists either from home visits or walk-in patient referrals. The laboratory staff have community college or university training as lab technologists and are typically assigned to a specific laboratory location - although, as noted, there was once a laboratory at 25 Leonard Avenue which has now been transferred or absorbed elsewhere in the system. The lab staff consists mainly of certified Registered Technologists who work with lab technicians and other para technical staff. There may be an on-site "senior technologists" who acts as a technical resource person, however these individuals do not exercise managerial functions, and as in the case of the SCC's, neither the source of work, nor the reporting relationships focus on the particular location where the employee happens to be working. Management is typically off-site, and work is transferred back and forth between labs as necessary.

26. Normally the phlebotomists do not have the appropriate training to work in the laboratory. Unlike the laboratory technologists, they are not certified or registered. However, most lab technologists are trained in phlebotomy, and because they have this training, they assist in the SCC's from time to time. Technologists can, and occasionally do, perform the work of phlebotomist. The job territories overlap.

27. All employees are attached to a particular location - even the couriers. To this extent, they have a regular place of work - even the home-care phlebotomists who are regularly "on the road". Should an employee wish to change to another location, she/he may request a transfer and/or apply for a vacancy at another location. Vacancies are advertised in a "positions available" list which is distributed and posted at all locations every week. At the present time, movement of this kind can occur without impediment, because the terms and conditions of employment (seniority based or otherwise) are standardized across Metropolitan Toronto. In other words, there is a common pool of work opportunities within Metropolitan Toronto within which employees currently have a degree of choice. Similarly, MDS can now shift employees, or work, from one location or work group to another, as business dictates, without impediment.

28. There is an interchange of employees between work locations and job functions. Laboratory technologists perform phlebotomy from time to time in an SCC at their own regular location, or elsewhere. In cases where coverage is not available in a particular location, SCC phlebotomists cover at other locations for unexpected or short absences and vacation during the off season. Long-term absences (i.e. for pregnancy leave and/or long-term illnesses) are generally covered by the hiring of temporary help, or by offering more hours of work to other employees from that location or from other locations. These arrangements are facilitated by the relative proximity of locations within Metro, and by the interchangeability of employees, and work. During the heavy vacation period "float" employees may be hired to cover vacation absences at a number of locations - although presumably part-timers can do the same. The single employee locations naturally require an employee from another location to relocate whenever the incumbent employee is absent.

29. The home-care/mobile phlebotomists cover other locations from time to time. There is also an on-call service for holidays and week-ends, which covers all of Metropolitan Toronto. For

the extended call service, a home-care phlebotomist from 25 Leonard Avenue covers for the areas normally covered by 25 Leonard Avenue and 1371 Neilson Road. A home-care phlebotomist from 2425 Bloor Street covers the west end of the city.

30. The home-care/mobile phlebotomy group draws upon employees from laboratories and SCC's at other locations with some frequency. The business records indicating employee interchange do not provide a complete picture because, heretofore, there has been no need to keep records of where particular employees work, or for how long, or what precisely was done. The payroll records do not indicate changes in location because location has not been relevant to the employees' terms and conditions of employment. Nor is the work geographically rooted, or inevitably linked to a particular SCC location.

31. Nevertheless, the company's records do confirm that there is a regular interchange of employees between the company's various locations. For example, in representative periods, laboratory employees and phlebotomists from 208 Bloor Street West have come to work, temporarily, as mobile phlebotomists at 25 Leonard Avenue. Conversely, laboratory employees, (when there were such) at 25 Leonard Avenue went to work at 208 Bloor Street. The evidence also discloses interchange back and forth between 25 Leonard Avenue, 2415 Bloor Street, and 360 College Street, as well as between "mobile" or "home-care" collection duties, and similar duties undertaken by phlebotomists stationed on site. There is also interchange between functions and locations other than 25 Leonard Avenue, the union's proposed bargaining unit. During their temporary transfer to the home-care group at 25 Leonard Avenue, transferees attend at that location to collect their assignments, and report to the manager of home-care in the same way as the other mobile phlebotomists do.

32. The evidence indicates that interchange is typical of this organization - although of course each individual spends most of his or her time at one location, so that, on a percentage basis, the amount of work done by "outsiders" is a small percentage of the total hours worked at any particular location. But there is regular movement into, and out of, what the union proposes as the unit of employees appropriate for collective bargaining. The union's proposed bargaining unit perimeter does not enclose a rigid grouping of individuals, or a fixed body of work, which, as we have already noted, is readily transferable to other locations, as is the SCC itself. The lab formerly at 25 Leonard Avenue is one example of this, but, as counsel pointed out, with three locations within a couple of blocks, it would be relatively easy to combine, modify or rearrange work arrangements or workers; moreover, favourable leasing opportunities might make that desirable. The union claims that this does not create insuperable collective bargaining problems; however, one is left to wonder about the individual normally stationed at 25 Leonard Avenue who nevertheless spends hours, days or weeks working elsewhere in the system, or the individual normally situated elsewhere, who spends hours, days or weeks working at 25 Leonard Avenue. At the present time, this kind of mobility, shifting of work, and shifting of employee work assignments, is undertaken without impediment, because there are uniform terms and conditions of employment across Metropolitan Toronto. It does not matter where the phlebotomist works.

33. At the present time, there is nothing to distinguish the wages, benefits, or working conditions of employees at 25 Leonard Avenue, from the wages, benefits or working conditions of employees at other locations in Metropolitan Toronto - including the location across the street and the one around the block. There is a standardized system applicable to all employees. Rates of pay are based upon the job that the individual is doing (phlebotomists, laboratory technologists, etc.) and are uniform across Metro, with established pay bands for each position. All phlebotomists are paid within the same band wherever they work, and whether they are normally stationed at a particular SCC, or work as a mobile phlebotomist performing "home-care" duties. Likewise, labora-

tory employees are paid in the same way wherever they work. Geography is irrelevant for these employment purposes.

34. There is one centralized payroll system which provides a direct deposit to the employee bank accounts. Full-time staff are paid an annual salary. Part-time staff are paid on an hourly basis. All staff are eligible to receive merit increases as part of their annual salary review.

35. There is a common package of employee benefits for all eligible employees (i.e. those working more than twenty-four hours per week). There is no distinction based on work location or work function. Vacation entitlements are the same for everyone, and are based upon years of service. Uniforms or uniform allowances are available to all lab staff, and to all phlebotomists, whether mobile or stationed at a particular SCC. However the phlebotomists doing home-care duties, "on the road", receive a travel allowance.

36. Part-time employees are not eligible for benefits. Their vacation pay is paid annually.

37. There is a standard work week of thirty-seven and one half hours for all phlebotomists and laboratory staff, wherever they are located and whatever their particular functions may be. Overtime is paid at time and a half for all workers. The amount of overtime depends upon the needs of a particular location.

38. The SCC's are generally open from 7:30 a.m. to 9:00 p.m., depending on the needs of the patients and the physicians in the locations. Similarly, the laboratories are generally open from Monday to Friday and Saturday mornings, depending upon the patient and physician needs. Work scheduling is adjusted to meet these requirements, using part-time employees as necessary. Mobile phlebotomists generally work Monday to Friday starting at 7:30 a.m. and finishing about 3:00 p.m. - again whatever their location might be.

III

39. The issues posed by this case are not new. In fact, the case is so similar to an earlier one involving a Toronto competitor of MDS, that the earlier decision is worth reproducing at length. In *Cybermedix Limited*, [1979] OLRB Rep. Aug. 743, the Board wrote:

3. The respondent operates a medical testing laboratory service. It has some seventeen locations in Metropolitan Toronto, some of which are specimen collection centres, some of which do both collecting and testing and one of which also includes administrative offices. The union requests certification for a bargaining unit of all employees of the respondent in Metropolitan Toronto with the exception of office and clerical employees. The respondent submits that each location should be a separate bargaining unit or that, alternatively, the employees should be grouped in six separate bargaining units. A further alternative put forth in the respondent's reply is that two bargaining units be established, one being comprised of its central laboratory at 78 Oakdale Road, Downsview, with all other employees falling within a residual unit.

4. Counsel for the respondent requested that the Board appoint a Labour Relations Officer to inquire into the composition of the bargaining unit. The employer wanted to establish in evidence that there was no interchange of employees between the locations and that the functions of immediate supervision and hiring were confined either within the separate locations or several small groups of them. For those reasons it submitted that a number of separate bargaining units should be established. At the hearing Counsel for the respondent stated that if there were a regular interchange of employees the respondent would agree to the Board's usual municipality-wide bargaining unit for all of its locations in Metropolitan Toronto.

5. The interchange of employees between two or more locations is but one of a number of factors considered by the Board in its determination of an appropriate bargaining unit. The Board must determine whether there is a substantial community of interest among employees in a pro-

posed bargaining unit. It therefore considers the nature of the work performed, the conditions of employment, the skills of employees, the employer's administrative framework, the geographic circumstances of the respondent's operation and the functional coherence and inter-dependence of the employees in its several locations. (*Usarco Ltd.* [1967] OLRB Rep. Sept. 526.)

6. In this case the employees in the respondent's various locations exercise the same skills and perform the same kind of work under similar conditions of employment within the tiered framework of a single administration. They all work within Metropolitan Toronto, an area which the Board has determined to be an appropriate geographic designation for a multi-location service enterprise. (*The Goodyear Service Stores* 65 CLLC, ¶16,018.) And it is clear from the representations before the Board that in the collecting and testing which they perform, all of the employees are, to a substantial degree, functionally inter-dependent.

7. When an employer operates a number of essentially similar service outlets within a municipal area it is, generally, not most conducive to collective bargaining to parcel the employees within that area, all of whom have similar bargaining interests, into a series of fragmented bargaining units. The possibility that some of the bargaining units might be represented by one union, some by another, while others may have no union representation at all can lead to invidious results for the employees, for the unions concerned and for the employer. Absent compelling reasons to the contrary in that situation a single bargaining unit of all employees with the municipality is generally the most rational and viable bargaining unit. (See *The Goodyear Service Stores*, *supra*, and cf. *Fotomat Canada Limited* [1979] OLRB Rep. Apr. 306.) There may be considerations of industrial relations policy such as employee access to collective bargaining and the ability to organize for the purpose of union representation which may override the Board's normal aversion to fragmentation. (See *McDonald's Restaurants of Canada Limited* [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House* [1974] OLRB Rep. Nov. 7; *Canada Trustco Mortgage Company* [1977] OLRB Rep. June 330) but those concerns do not apply in the instant application.

8. In this case the fact that there may be no substantial interchange of employees between locations and that the functions of hiring and supervision are confined within the locations, even if proved through the inquiry of a Board Officer, would not alter the conclusion that a single bargaining unit would best serve the common interests of the employees concerned. The Board will therefore not order a formal inquiry into the composition of the bargaining unit, there being no *prima facie* reason to do so, nor depart from its normal policy of adopting a municipality-wide bargaining unit for the employees in the respondent's service outlets and testing facilities.

9. For the foregoing reasons, the Board finds that all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

40. As will be seen, the circumstances in *Cybermedix* are virtually identical to those in the instant case. If anything, the circumstances here point even more strongly to a municipal-wide bargaining unit because, in this case, there is an interchange of employees between various locations, supervision is not confined within those locations, and the allocation of work is fluid as between the various SCC's.

41. Nothing in the Board's jurisprudence since *Cybermedix* points strongly towards a different conclusion on the appropriate scope of the bargaining unit. *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, may have shifted the Board's focus from the somewhat abstract notion of "community of interest", to the more concrete labour relations problems which might flow from one bargaining unit configuration or another; but *Hospital for Sick Children* did not involve or endorse fragmentation, and later cases continued to express concerns about the collective bargaining difficulties which arise when a company's organization is subdivided into a number of potentially competing bargaining units, with different conditions of employment, different seniority districts, and so on (see, for example: *Kidd Creek Mines*, [1986] OLRB Rep. June 736, and more recently, *Mobil Chemical Canada Ltd.*, [1987] OLRB Rep. Apr. 559, and *Hornco Plastics Inc.*,

[1993] OLRB Rep. May 411). Clearly, a trade union need not organize the *most* comprehensive or the *most* appropriate bargaining unit, and the Board must be careful lest its bargaining unit determinations raise unwarranted obstacles to organizing. But that does not mean that notions of appropriateness or collective bargaining efficacy should be disregarded altogether, or that a union is entitled to any unit it applies for just because, if that unit is not approved, a certificate may not issue. As the Board said in *K-Mart Canada*, [1981] OLRB Rep. Sept. 1250, it is necessary to consider the circumstances of the particular application before it and “balance the pattern of organization against the disruptive effects of excessive fragmentation”. The recent amendments to the Act have not abandoned the concept of “appropriateness”; and, if anything, the legislative treatment of part-time units, and the new power of consolidation, both suggest that excessive subdivision of an employer’s organization is undesirable from a collective bargaining point of view.

42. There is nothing in the particular facts or evidence of this case to establish any unusual obstacles to organizing on a broader basis, either in this industry or for this employer. There is no evidence about the “pattern of organizing” (see *K-Mart Canada, supra*), nor do the facts establish that the Board’s bargaining unit determinations have contributed to unreasonable obstacles to organizing. *Cybermedix*, a similarly situated competitor of MDS, was organized on a municipal basis, and in a somewhat similar context, another union organized quite a number of municipal clusters of “Fotomat” stores, which like SCC’s were spread throughout a municipal area and served as drop-off or servicing points for customers. There is no evidence here that the union made efforts to organize which were hindered by the Board’s approach to bargaining units - or even that the union made efforts to organize employees working across the street, or around the block. And the health care sector itself is highly organized - albeit by unions other than the present applicant.

43. In summary, we see nothing in the circumstances of this case which would prompt us to reach a different conclusion than the panel in *Cybermedix*.

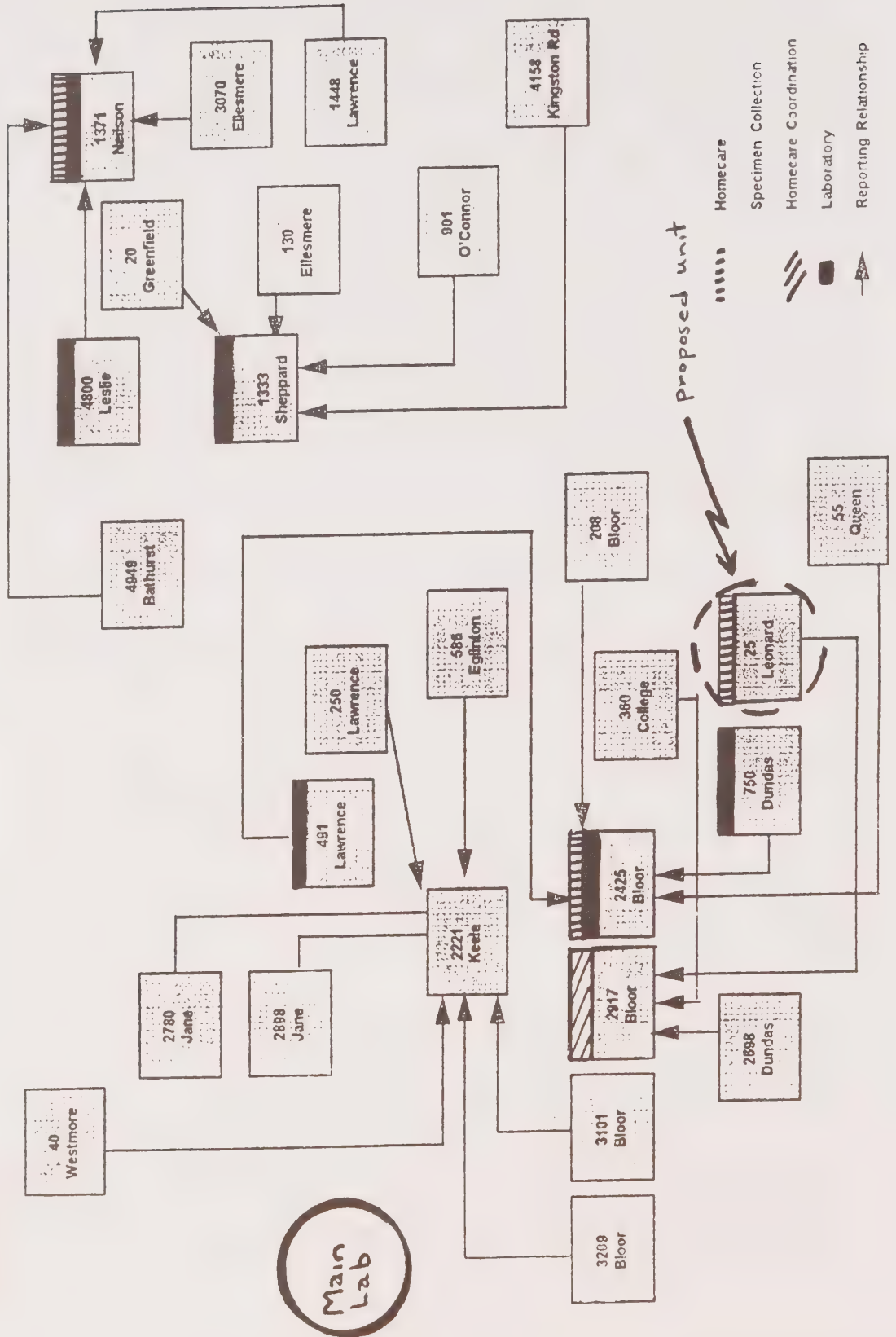
44. We find that neither the single location unit proposed by the applicant nor a variation encompassing the home care group constitute an “appropriate” unit for collective bargaining purposes.

45. It is unnecessary to consider whether some other subdivision of the employer’s enterprise would be appropriate.

46. Having regard to the foregoing, and the level of support demonstrated by the union’s documentary evidence of membership, this application is dismissed.

MDS LABORATORIES - METROPOLITAN TORONTO

CHART 'A'



1269-92-R United Food and Commercial Workers, Local 459, Applicant v. Medical Centre Holdings (Leamington Ltd.), Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Union making certification application to represent employees of medical centre - Centre housing 13 doctors, as well as laboratory and x-ray services and employing 18 clerical employees and 8 registered nurses - Union proposing bargaining unit excluding registered nurses - Board finding that overlap in functions of clerical employees and registered nurses in proposed unit likely creating serious labour relations problems - Union's proposed bargaining unit held not appropriate - Application dismissed

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *Richard A. Blair*, *Jeff Andrew*, *Gene Collard* and *Brian Neathe* for the applicant; *Theodore Crljenica* and *Allan Nicholson* for the responding party; no one appearing for the Objectors.

DECISION OF VICE-CHAIR, K. G. O'NEIL AND BOARD MEMBER, R. M. SLOAN;
September 30, 1993

1. This is an application for certification in which the parties have been unable to agree on the appropriate bargaining unit. There are no other issues outstanding between the parties. The bargaining unit sought by the applicant is as follows:

all employees, save and except registered nurses, the Administrator and persons above the rank of the Administrator, of the employer in Leamington.

The respondent is of the view that R.N.'s should also be included in the bargaining unit, i.e. the appropriate unit is an all-employee unit.

2. The parties made oral and written submissions about both the facts and the law applicable to this case. The evidence before the Board in this dispute is the transcript of examinations of several employees before a Board appointed examiner, which we have carefully considered.

3. The responding party ("the medical centre") is alternately described as a clinic by the applicant and a doctor's office by the responding party. The building in which the medical centre operates comprises offices of 13 doctors, including general practitioners and specialists, and also houses tenants who provide laboratory and x-ray services to the medical practitioners. There were apparently 26 employees at the time of the application, falling into two general groups, referred to by the parties as the clerical employees and the nurses. The eighteen clerical employees, 14 full-time and 4 part-time, would fall into the proposed bargaining unit. The addition of the 8 nurses, two full time and 6 part-time, would create the all-employee unit argued for by the respondent. Some duties of each group are never done by members of the other group, but there is an area of duties agreed to be primarily the function of the clerical group, which nurses also perform, which takes up a significant portion of the nursing group's time. The dispute centres around what effect that area of overlap should have in the determination of the appropriate bargaining unit.

4. There are six distinct functions of the clerical group: 1) Maintenance of medical charts in the file room (three employees). 2) Writing and checking charts (done by two employees on a rotating basis). When not writing and checking they work at the reception desk. 3) Dicta typing (two full-time employees); the remainder of the dicta typing duties are performed by two of the

receptionists in the upstairs offices, referred to as clinics by the parties. 4) Assisting the officer manager. There is an assistant to the office manager who spends 80 per cent of her time at this job, and 20 percent at the reception desk. She also fills in for the dicta typists. This job is primarily concerned with billings, clarification of OHIP numbers and other related matters. 5) Reception. There are five employees at front reception where patients are greeted, phone calls are answered and appointments are booked. Enquiries and mail are dealt with through the front reception as well. 6) Secretary/receptionist (upstairs clinic) - four employees serve in this capacity which involves the provision of administrative support to three separate clinics situated in the upstairs area of the medical centre, performing a variety of secretarial and clerical functions. Two of these secretary/receptionists also perform dicta typists duties.

5. The parties are agreed that nurses do not do writing and checking, dicta typing, or work assisting the office managers. The evidence is uncontroverted that the nurses' role in retrieving matters from the file room is limited. The areas of overlap are primarily referable to the category of reception duties. In this we include greeting patients, answering phone calls, booking appointments and entering them into the computer, answering general inquiries and escorting patients to an examining room. Of this list of overlapping duties the parties are in agreement that answering phones is the primary responsibility of the reception staff which the applicant seeks to represent and that walking patients to the examining room is primarily a function of the nurses. It is also common ground that the groups cover for each other in these duties when one or the other is busy, which happens on a fairly frequent basis. Nurses cover for some clerical breaks. Either nurses or clerical staff may walk people back to the labs run by the tenants of the building. Employees in both groups fill out certain types of forms for patients as necessary.

6. The duties of the nurses that are not overlapping except to the limited extent indicated below, are those which relate to the actual provision of medical examination and/or procedures by the doctors at the medical centre, including assessment of the urgency of patients' conditions. The nursing functions performed by the nurses include a wide range of injections, assisting with inserting and taking out sutures, assisting in minor surgery including the removal of moles and polyps, vasectomies, colonoscopies, colposcopes, and cryosurgery, assessment of patients and the performance of electrocardiogram tests. Much of the nurses' work on the phones is qualitatively different from that of the clerical employees in that nurses give advice or information of a medical nature that the clerical staff is prevented from doing. This includes the communication of test results, and assessment of the level of urgency of a patient's condition on the phone. Clerical staff turn to nurses for direction in regards to patients when they are unsure and routinely refer questions with medical content to the nurses. Some clerical staff occasionally do tasks normally solely the province of R.N.'s such as drying equipment, doing dipstick urine analysis and weighing patients. One witness said this occurred when the nurses are extremely busy. It is clear that the majority of the clerical group never do these latter tasks, and that the only primary function of the nursing group that members of the clerical group do with any regularity is walking patients to the examining room.

7. No specific skills are required to be hired into the clerical positions at the medical centre, whereas certification as a registered nurse is required to be hired as a nurse. Skills such as dicta typing and computer operation are involved in the performance of some of the clerical jobs; most of these skills are acquired through on the job training. Each of the members of the proposed bargaining unit, with one exception, commenced work in the filing room and progressed into the other functions. The exception to this was a long-term employee who started work at the reception desk.

8. The parties do not agree on whether or not the nursing certificate is actually required by the College of Nurses or the *Health Disciplines Act* for the functions the nurses perform. However,

there is no dispute that it is a qualification for the job. There was testimony from a registered nurse to the effect that she would immediately report to management any non-nursing personnel found performing nursing functions.

9. There is substantial mobility and job interchange between each of the clerical jobs but none into the R.N. group. The writer/checker position is permanently rotated with the reception position and clerical staff fill in for each other on days off, vacations and illness. Members of the applicant's proposed bargaining unit do not fill in for nurses. There is some coverage of clerical positions by nurses for breaks or short absences in the absence of other alternatives.

10. Direct supervision and scheduling of the clerical group is done by Fernanda Gillis, the office manager. She in turn reports to the administrator, Allan Nicholson, who has overall responsibility for both groups. Scheduling for the nurses and the clerical staff is done separately. Nurses' schedules coincide with the schedule of the doctors to whom they are assigned, whereas clerical employees are scheduled at all hours that the clinic is open. Nurses are not allowed to go home at the end of the day if a doctor has not completed an examination whereas a member of the proposed bargaining unit could. Part-time nurses are cancelled when doctors are on vacation. Staff meetings are open to all staff, but attendance by nurses was generally by a representative. Although a group of clerical employees raised salary issues at a staff meeting not long before this certification application, there is no significant history of negotiation about terms and conditions of employment with either group per se.

11. As to salary and working conditions, there is a range of \$13.00 to \$14.00 per hour for nurses and \$7.50 to \$12.00 for the clerical personnel.

12. The union's submissions include the following salient points as to the applicable law:

(a) It is submitted that the question that the Board is to determine in the course of the exercise of its discretion pursuant to Section 6(1) of the *Act* is whether the "unit which the union seeks to represent encompasses a group of employees with a sufficiently-coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer." See *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. Counsel suggested that the serious labour relations problems have to be at a level of the irrational or unduly disruptive of labour relations. The union's argument referred to "intractable" problems as the kind that would lead to the rejection of the applicant's proposed unit.

(b) Counsel argues that the Board has made it very clear that it is not interested in defining the best possible unit or the better of two possible units, but merely whether the unit advanced by the trade union is an appropriate one for purposes of collective bargaining. In this regard, the union asserts that the Board's approach recognizes that the range of "appropriateness" is extremely broad. If the applicant had requested an all-employee unit it could be appropriate but where it has not it should not be forced upon it, counsel submits.

(c) A primary concern expressed by the Board in determining the appropriateness of a proposed bargaining unit is the extent to which the proposed unit will enhance employees' collective bargaining rights pursuant to section 3 of the *Act*, and more expressly, the degree to which the proposed unit will enhance access to meaningful collective bargaining opportunities. In this

context, counsel argues the Board has noted the importance of the employees' right to self-determination in collective bargaining, and as a result, the Board has paid considerable attention to the employee's expressed wishes with respect to the unit proposed by the trade union.

(d) It is submitted that the practical effect of the Board's jurisprudence developed in light of these considerations is to set an extremely low "standard of review" by the Board of the appropriateness of the proposed unit. It is submitted that the jurisprudence creates a heavy presumption in favour of the unit proposed by the applicant, and casts upon the respondent a substantial onus to establish either that the proposed unit is not viable in its own terms, or that any labour relations problems would be occasioned by its adoption would be of a particularly serious nature. It is submitted that there is no evidence in this case to support either branch of the suggested onus on the respondent.

(e) In determining the appropriateness of a proposed unit, the Board will consider the collective bargaining practices in a given area. Union counsel argues that it is the long-standing and unwavering practice of the Board in the health-care field to recognize that separate units are appropriate for persons employed in a nursing capacity and other employees of the employer. Counsel says that the proposition that nurses bargain separately from other employees is no longer in question. It is said that the potential conflict between professional obligations and normal labour relations considerations or practices, such as the exercise of the right to strike, support this.

(f) Conversely, counsel argues, it is the universal practice of the Board in the health care sector to exclude registered nurses from service, technical or paramedical units except where such a unit has been requested by the trade union and is otherwise viable. The union states that the Board's standard practice in this respect extends to Registered Nurses' Assistants. The work of the latter employees is considerably more closely integrated with the work of registered nurses (considered to be 50 percent in *Hospital for Sick Children*) than is work of any of the employees in the applicant's proposed unit. In the health care area, the Board has not found that the multiple overlap of functions between R.N.'s and R.N.A.'s and a general team approach toward the provision of health care by whole groups of professionals and paraprofessionals invalidate a unit excluding R.N.'s.

(g) Counsel submitted that although the Board will consider overlap of function in the course of determining the viability of a unit, such overlap must be of such a serious nature as to present intractable labour relations problems were the proposed unit to be accepted. For example, in *Strathroy Middlesex Hospital*, the viability of a proposed unit was rejected on the grounds that, inter alia, persons' bargaining unit status would be based on their professional accreditation notwithstanding that they were performing identical work in identical classifications and that because, given the extent of the overlap, it would be difficult to determine who would be in the bargaining unit. Counsel maintains that no such considerations exist in the present application. The union maintains that the overlapping duties are incidental

to the nursing duties and are not significant as the employees are in no way interchangeable.

(h) Counsel argues that the significance of a qualification or credential in a bargaining unit description context is whether or not the credentials reflect a labour relations reality. Referring to *Strathroy-Middlesex*, counsel says that the question remains whether an employer's practices and history of representation shows a realistic distinction by professional qualification or not? Are they a significant part of the labour relations reality. In the context of this medical centre the applicant suggests they are.

13. The respondent's main points may be summarized as follows:

(a) The general principles applicable in the hospital industry should not be taken for granted in this situation. Counsel stresses that this is not a hospital, nursing home, or clinic but a doctor's office, a business. As neither counsel was able to find any previous authority dealing with a doctor's office, respondent counsel urged us to handle this as a case of first impression - to consider the impact a decision in this case would have on smaller situations such as four doctors and two nurses.

(b) Counsel urged the Board to find that it does not make sense to have two bargaining units in one office because there is major overlap between the two kinds of employees and no distinct community of interest. Counsel describes the business as that of serving the patient and in that respect the two kinds of employees overlap entirely in his submission.

(c) The employer stresses that this is not a facility covered by the *Hospital Labour Disputes Arbitration Act* and therefore strikes are a possibility, bringing into play the traditional concerns about fragmentation and jurisdictional disputes being enforced through strikes.

(d) The employer urged the Board not to transfer the jurisprudence in hospitals and elsewhere of giving separate R.N. units to the context of a doctor's office. Counsel asserts that this would produce fragmentation, with all its negative effects. Counsel asserts that it is quite common for R.N.'s to be represented by one bargaining agent with the service unit in nursing homes. Counsel says that any tension between the professional and labour relations obligations of nurses is an issue for the College of Nurses and not one for the Board in the context of a bargaining unit determination.

(e) Counsel outlined the community of interest between the two groups in some detail and urged us not to divide that common interest. He stressed that the two groups of employees work together extremely closely in the same area with the same patients. The administrator is in charge of hiring both kinds of employees and is ultimately responsible for the supervision of both. Employer counsel urged upon us the analogy of production facilities where skilled trades are found in the same unit as unskilled workers and their different level of skill is reflected in their pay differential. Counsel says that the differences in hours of work and scheduling are not an indication of a separate community of interest but a reflection of the practical reality of having to schedule with their own backup in mind. Respondent counsel

underlines that with the exception of the pay scale, the terms and conditions of employment are identical or very similar. Counsel asserts that neither group works more closely with the doctors and that the doctors assign tasks to both groups. One of the main serious problems that the employer envisions with a division between two units is that the doctors will not be able to give the same orders to either type of employee depending on who is most easily available.

(f) In terms of community of interest, employer counsel asked us not to make anything of the fact that more support staff attend office meetings than R.N.'s, since all staff are invited. Counsel asserts that there is nothing in the record to support the suggestion that the administration of the centre has been divided into two groups by the employer.

(g) As to the functions performed by the nurses, counsel maintains that none of them require an R.N. certificate, including giving shots. Counsel points out that there are exceptions to the idea that there is no overlap in functions as to the "nursing duties" as for instance the fact that some of the support staff clean up the rooms and clean or dry instruments. He suggests that the overall picture is that the staff is a team and when someone needs spelling off, staff spell each other off. Counsel gave the example of receptionists being present in the doctor's office during pap tests when nurses were not available. Counsel points to examples in the evidence where it was estimated that only 35 per cent of the nurses' time at work was true nursing, leaving 65 to 70 per cent overlap of duties. Even the union witness said that she spent 40 per cent of her time doing reception work and in the 60 per cent of time that she said was nursing she included walking patients to and from the waiting room.

(h) Counsel listed the duties that overlap, which focus around the reception area where patients have contact with the staff, rather than the billing room or the writing and checking area, as set out above. Very important in the respondent's submission is the fact that doctors do not distinguish between R.N.'s or clerical staff when asking for certain tasks to be performed such as getting a file, booking an appointment or calling for test results.

(i) Counsel stressed that the receptionists have face to face contact on a continual basis with the R.N.'s and the M.D.'s. They are not in any way separate from the R.N.'s or M.D.'s in their work. They are working together in a health related field to provide the same service to the same patients. Although there is no job mobility without going back to school from clerical to nursing jobs, there is a fluidity in terms of the duties that are assigned to them. We are asked to find that the overlap is much more than filling in for breaks. Counsel described it as a team dealing with patients from the time they call or come in, in preparation for the doctor doing whatever is needed medically.

(j) The respondent describes the overlap of duties as a mine field for jurisdictional disputes. Counsel asks what the employer is to do if answering phones becomes bargaining unit work and nurses are not allowed to do it? What about computers, or greeting patients at the desk? Counsel stresses that this

case involves the offices of 13 doctors in a town of 15,000 with the public going in and out. Counsel refers to the potential for two sets of negotiations and to the prospect of rotating strikes.

(k) Counsel refers to section 73.1 of the Bill 40 amendments which deal with strike replacements and asks rhetorically how the employer will decide if there is a violation when there is so much overlap that it is impossible to split the workforce in two. Counsel argues that it is not just the creation of costly arbitrations that should concern the Board but the difficulty of making the Act itself function.

14. The applicant replies that this is not an industrial setting with skilled and non-skilled employees but a group of non-professionals who are not required to perform duties like giving injections and do not have the same level of education or income as those with the nursing credentials. Counsel asserts that the clerical group want to bargain without the R.N.'s. Counsel urges us to be mindful of the impact for collective bargaining on the group of non-professionals if they are forced to bargain together with a group of professionals with whom they do not wish to bargain. Counsel maintains that in the face of the Board's jurisprudence that has given a tremendous amount of recognition over the years to the fact that the bargaining interests of R.N.'s and support personnel are not the same, the Board should not accede to the respondent's request. Counsel stresses that there will not be a proliferation of competing interests to tie the hands of the employer. Counsel urges us to find that the fact that collective bargaining carries with it the seeds for disagreement such as over what is bargaining unit work does not equal the destruction of good labour relations.

15. Union counsel argues that in a world where often people want to be in a bargaining unit with people with higher wages because of the upward pull, an important statement is being made by these employees who are asking to be certified without professionals in their bargaining unit. It is a fundamental reflection of the disparate community of interests that they have, in counsel's submission.

Decision

16. Throughout the Board's jurisprudence, there have been many descriptions of the balancing of interests, both public and private, which is necessary to the determination of the appropriate bargaining unit in a certification application. Employee and trade union rights to self-determination and access to collective bargaining are often in tension with the Board's responsibility to fashion the appropriate basis for rational collective bargaining, including the reduction of structurally based labour relations problems, including, but not limited to, undue fragmentation. Classic statements of the Board's approach are set out in *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7, paras. 10 through 12, *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, paras. 12 through 24 and the *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900, paras. 21 to 24, among others. As was observed in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, in any one case these themes unfortunately only describe conflicting impulses and do not provide concrete solutions. Both counsel accepted the formulation in *Hospital for Sick Children*, *supra*, as an appropriate crystallization of the Board's approach, i.e. does the unit the applicant seek to represent encompass a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. The interplay of the conflicting impulses, as applied to any particular fact situation, is dealt with in the context of the Board's jurisprudence to the effect that the Board is not primarily concerned

with finding the ideal or most appropriate unit. See, among others, *Homewood Health Centre*, [1992] OLRB Rep. Feb. 181 and *U-Need-A-Cab Limited*, [1989] OLRB Rep. Dec. 1275.

17. Two of the cases cited to us in argument, *West Lincoln Multilevel Health Facility*, [1988] OLRB Rep. Nov. 1185 and *King Nursing Home*, [1987] OLRB Rep. Oct. 1257 deal with the question of whether or not R.N.'s should be excluded from all employee bargaining units in nursing homes. In the *King Nursing Home* case the applicant wanted an all-employee unit, while the respondent argued the R.N.'s should be excluded from the unit based on community of interest grounds. By contrast, in *West Lincoln Multilevel Health Facility* the positions were reversed; the applicant wanted the R.N.'s excluded, while the respondent argued for their inclusion, based on concerns about undue fragmentation. Although the structure of the two workplaces was different, (one was a nursing home, and the other a combined nursing/rest home) the R.N.'s in question were both R.N.'s in nursing home roles. The two decisions read together mean that the Board may consider the inclusion or the exclusion of R.N.'s to be appropriate, depending on the particular combination of factors argued and in evidence, including what unit the applicant wishes to represent. See also *Provincial Nursing Home Limited Partnership*, [1993] OLRB Rep. July 642.

18. Both parties to this dispute cited *King Nursing Home* cited above, in support of their submissions, the employer for the proposition that an appropriate bargaining unit would include the nurses and for the proposition that one should not assume that one health care context was transferable to another. In that case the Board said that it was not prepared to assume that the hospital context of exclusion of R.N.'s from all employee bargaining units was applicable in the nursing home sector. The union, on the other hand, refers to the case for the statement made by the Board at the end of the decision to the effect that it did not wish the decision to be taken to mean that the Board considers it appropriate in other circumstances to include R.N.'s in all employee units in the nursing homes.

19. The fact situation before us is relatively novel. We were referred to no cases dealing with either doctor's offices or clinics, as the parties in turn characterized the facility we are dealing with. There is much that distinguishes this facility from hospitals and other public health care institutions. The distinguishing factors include the lower level of complexity of the facility, the private aspect of the business as opposed to the public nature of a hospital or other health care institution, and the fact that the parties agree that the *Hospital Labour Disputes Arbitration Act* (HLDA) is not applicable. There is also the probability that the nursing work in hospitals, nursing homes, homes for the aged and health units (given 24 hour nursing care or itinerant nursing in those contexts) is carried out more often in the absence of a physician and thus with more independence, than in the medical centre. On the other hand, there is much about the facility that appears similar to an out-patient clinic in a hospital, in terms of the medical care provided and the tasks performed by the employees. For example, most of the clerical functions are closely analogous to those of ward clerks. The medical centre is clearly a health-care facility in the ordinary sense of the words. Although there is the absence of the specific legislation applicable to hospitals, nursing homes and homes for the aged, doctors and nurses are individually regulated by the same statutes when working in the medical centre as when working in public institutions. Thus there are important distinctions as well as important similarities between this and the health care contexts more common in the Board's jurisprudence to date.

20. The parties' argument revolved around what weight should be given to the Board's history of granting separate bargaining units to R.N.'s in many health care contexts where the applicant has requested it. The applicant relies on the following cases for the proposition that that practice is too well-established to be departed from in this case, particularly where the employees in question do not wish to bargain with their R.N. colleagues: *Hospital for Sick Children*, *supra*,

Porcupine General Hospital, [1987] OLRB Rep. Mar. 423 at para. 4, *Wellesley Hospital*, [1974] OLRB Rep. Jan. 55 at para. 10 and *Essex Health Authority*, [1967] OLRB Rep. Nov. 716 at para. 12. The respondent, by contrast, says there is no established practice applicable to a doctor's office and that the high degree of overlap between the two groups of employees shows that it would be a mistake to transfer the practice from the traditional contexts, as it would cause serious labour relations problems in this workplace. Furthermore, the respondent relies on *King Nursing Home*, *supra*, *Eastern Ontario Health Unit*, [1976] OLRB Rep. Nov. 687 and *The Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900 for support for its proposition that it is not necessarily appropriate to exclude R.N.'s and other professionals from all-employee units.

21. The union's underlying premise that it is the unquestioned practice of the Board to exclude R.N.'s from all employee units unless the applicant wants them included, is based on cases like *Porcupine General Hospital*, cited above, which give support to the idea that R.N.'s would be granted their own unit if a union with craft or craft-like history applied for one, leaving the rest of the employees to be organized by another bargaining agent. Since the unit applied for here is identical to what would be left if the R.N.'s had been organized first in an R.N. only unit, the effect of the union's argument is really that we should use the same configuration, regardless of which group seeks certification first. A number of observations about this argument are in order.

22. Firstly, the long term wisdom of granting R.N. only units even in the traditional contexts, at least in light of their community of interest with other professional and para-professional groups, has been questioned in several recent decisions of the Board. See *Hospital for Sick Children*, *supra*, at paras. 36 to 38, *Mississauga General Hospital*, [1991] OLRB Rep. Dec. 1380 at para. 42, *South Muskoka Memorial Hospital*, [1992] OLRB Rep. Apr. 520 at paras. 6, 15 and 18 and *Strathroy-Middlesex General Hospital*, [1992] OLRB Rep. Oct. 1103 at para. 33. As evidenced by *King Nursing Home*, *supra*, where the applicant wishes to represent R.N.'s together with other employees, the Board will grant such a unit, in the absence of evidence of serious labour relations problems. Moreover, as catalogued in *Hospital for Sick Children* there are other health care contexts in which nurses and other equally well-trained professionals bargain successfully with non-professional colleagues and professional colleagues with less formal training than they, such as in provincial psychiatric hospitals.

23. As well, in many situations where it has had the opportunity, the Board has expressed the idea that the effect of craft unionism on bargaining unit structures has not been particularly desirable, and is to be limited wherever possible. See in particular *Kidd Creek Mines*, [1984] OLRB Rep. Mar. 481 and [1986] OLRB Rep. June 736 and *TV Guide Inc.*, [1986] OLRB Rep. Oct. 1451. This is because it leads to fragmentation and other undesirable structural barriers to harmonious collective bargaining. (The applicant here makes no claim to craft status for these employees, but argues for divisions created by a craft-like R.N. unit in the past.) As well, even where a craft configuration is well established, a non-craft union is not entitled to rely on that configuration. See a discussion of the example of operating engineers in hospitals in *York Central Hospital*, [1978] OLRB Rep. April 382.

24. The respondent's argument, although not framed in these terms, amounts to saying that what it proposes is properly analogous to an office, clerical and technical unit, one of the Board's other "standard" units. We note that the Board's view of the "standard" office and clerical unit has also evolved. See, for instance, *Motor Coach Industries*, [1992] OLRB Rep. June 744, where the Board did not separate the office and clerical workers from the plant workers, albeit at the applicant's request. Moreover, where what is referred to as "standard" units are sought to be applied to a non-standard workplace, the Board will not apply them simply because they are called standard. See for instance *Creed's Storage Ltd.*, [1985] OLRB Rep. Feb. 238, where the applicant

sought separate office and plant units and the Board found that the interchange between the two groups was too extensive to find that two separate bargaining units were appropriate. It is clear from the decision that the Board considered that an all-employee unit would have been appropriate instead.

25. We return to the first prong of the formulation from *The Hospital for Sick Children*. Is the applicant's proposed unit a unit of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis? As mentioned in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, there are levels of community of interest, which range from that of all the employees in the enterprise to smaller groupings, depending on the circumstances. The applicant here says there is sufficient community of interest among the clerical and administrative employees to bargain while the respondent sees the community of interest of all the employees as one non-severable concept.

26. We are persuaded that there is a sufficient community of interest within each group to say that either the clerical group alone or an all-employee unit could form a coherent group for bargaining. Although the nature of the primary functions (as they were referred to throughout the evidence) of each group is substantially different, they are both providing different aspects of a health care service to the patients. The skills of the employees are very different, but are complementary, so they are not a barrier to being one cohesive bargaining group. The administration of the medical centre is centralized in the administrator, which supports the idea of the coherence of the larger group. Although we note the applicant's argument about the potential for tension between the professional obligations of an R.N. and the right to strike, we do not consider that potential to amount to a conflict of interest, or an indication of lack of sufficient community of interest to bargain together. Nor do we consider the different levels of education required to be enough reason to conclude that there is not sufficient community of interest for the two groups to bargain together. See the discussions in *Eastern Ontario Health Unit*, [1976] OLRB Rep. Nov. 687 and *Imperial Clevite Canada Inc.*, [1983] OLRB Rep. Oct. 1670 on related points. Nor do we take the arguments concerning the preference of the clerical group to bargain without the nurses to be evidence of lack of community of interest, even if we take it at its highest as a manifestation of self-determination.

27. However, there are two separate reporting streams for the two groups and the scheduling and similar administrative functions are not merged; these factors support the coherence of each separate group alone. The extent of the functional interdependence between the two groups supports the community of interest of the larger group, but does not exclude the viability of the smaller group. The groups are clearly working closely together in providing, as we said above, different aspects of a health care service to the same group of patients. However, there are areas of each group's work which are quite severable from the other. Prominent examples of this are the file room and writing and checking work of the clerical group and the work with minor surgery of the nursing group. Even in the area of reception duties, which shows the greatest degree of interdependence, all witnesses seemed clear on what was a primary function of which group. Although there are duties of the nursing group (such as washing instruments or weighing patients) which are done on occasion by a small number of the clerical group, there was a clear area of nursing functions which are not interchangeable, for example assisting with minor surgery, giving injections and removing sutures.

28. We conclude from this that the applicant's requested unit meets the first prong of the formulation from *Hospital for Sick Children's*, *supra*. We turn now to the second prong. Does the unit proposed cause serious labour relations problems for the employer?

29. The respondent argues that the labour relations problems that will be caused by the unit proposed are a recipe for chaos. The problems argued are set out above. They relate primarily to the area of overlap of duties and the potential for strikes and jurisdictional disputes in and between two potential bargaining units.

30. The applicant disagrees, saying, by way of example, that any problems created are much less likely to be serious than the problems created throughout the health care sector by the placement of R.N.'s and R.N.A.'s in separate units. The union cited *U-Need-A-Cab*, *supra*, for the standard of review of serious labour relations problems. The Board had this to say, in the context of finding that a pure driver unit was appropriate, even though the respondents' preferred unit, which would have included independent contractors, would likely also be appropriate:

11. What are the "problems" that the respondent identifies as flowing from the creation of a pure drivers unit? Its workforce would be divided into at least two bargaining units and perhaps one or two others depending upon how one treats office staff should they ever indicate any appetite for collective bargaining. That would be inconvenient. But it would be no different from most other organized industrial enterprises where blue collar and white collar employees are typically divided between part-time and full-time workers creating a minimum of four bargaining units, and hospital employees are divided into part-time or full-time units of service workers, technical workers, and office workers. The Board's inclination is not to multiply the number of bargaining units, but the collective bargaining reality is that there are many situations where its own policies (particularly separating full-time and part-time workers) have done just that, and there is little empirical evidence that collective bargaining has suffered for it. Similarly, as we have already mentioned, there are many examples of very large bargaining units, encompassing quite different employee groupings without obvious evidence of collective bargaining difficulties, and some very small units (registered nurses in a nursing home for example), that seem to survive. The unit proposed by the union here is neither irrational, nor even accepting the employer's best case, likely to be unduly disruptive to its labour relations.

Although we disagree with the applicant that this passage can be taken to mean that the proposed unit has to be irrational in some larger sense before it will be rejected, we do agree that it underlines that inconvenience is not enough to create a serious labour relations problem.

31. Although at one level, any labour relations problem is serious, this is not the sense in which the term is meant in the Board's jurisprudence. It is clear that there is a category of potential problem which the legislation provides for or the Board finds to be within the range of acceptability, and a difficult to define boundary beyond which the problems are considered so inherent in the structure that the Board should take its opportunity at the front end to avoid them. The balancing of interests referred to above permeates the whole exercise of determining the appropriate bargaining unit, including evaluating the labour relations problems anticipated.

32. The union relies on the Board's long-standing jurisprudence that there may be more than one appropriate bargaining unit in a workplace. From this it flows that there will often be more than one unit found to be appropriate in any given workplace. Here, the maximum units flowing from the union's request is two. Thus, there is no potential of proliferation of units with the current grouping of classifications. However, there is an equally long-standing jurisprudence which speaks of the advantages of broadly based bargaining structures. (See among others *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371 and *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250. These advantages underlie the fact that it is fair to say that outside the construction industry the Board's most "standard" unit is the all-employee unit (within a given municipality). Obviously there are many well accepted appropriate units that are less comprehensive. However, it is not a given that more than one unit will always be found to be appropriate.

33. The union also highlighted section 3 rights as part of its argument that the Board's standard of review of appropriateness is quite low. It is important to underline that the aspects of the Board's jurisprudence which speak of the focus on the applicant's unit in the absence of serious labour relations problems does not mean that "anything goes". The emphasis on the applicant's unit is in the absence of serious labour relations problems. Nor does the jurisprudence's acceptance that the most ideal bargaining unit is not required mean that the standard of review is at the very low level the applicant argues. The Board has a serious responsibility to use the opportunity at the "front end" to foster healthy collective bargaining as far as it is able in structuring a bargaining unit.

34. We are urged to look elsewhere in health care for models of what the applicant seeks. However, one of the predominant aspects of the other models is the history of piecemeal development of the various bargaining units in the hospital sector along lines which have resulted in anomalies and difficulties which hindsight finds difficult to rationalize on any comprehensive basis. The Board's concerns about many of them have been mitigated somewhat by the prohibition against work stoppages in the HLDAA (see *Strathroy Middlesex* cited above) or the fact that in the already fragmented structure of hospital bargaining, the placement of certain positions in one bargaining unit or another could not be seen to create further serious labour relations problems, (see *Hospital for Sick Children* cited above). We are not prepared to rely on that history in this sufficiently distinct context, to say that the hospital context demonstrates that serious labour relations problems are unlikely in this medical centre.

35. The labour relations problems anticipated by the respondent relate to the overlap in functions of the two groups of employees, described above. They include the potential for jurisdictional disputes and other difficulties such as discord over definition of bargaining unit work at the negotiating table, dislocation of work assignment in the medical centre, related costly arbitrations and other legal proceedings and the prospect of two sets of strikes over these issues. Although we reject the respondent's characterization of these problems as chaos, these are serious labour relations problems. They are not merely matters of convenience, although undoubtedly successful negotiations would mean they were not intractable. Although, in a new situation, there is always an element of speculation involved, there is no reason to believe that the structural conflicts, grievances and jurisdictional disputes over bargaining unit boundaries, increasingly present elsewhere in the health care context, would not arise here as well. As mentioned earlier, there is not the buffer of the HLDAA to mitigate concerns over work stoppages over these avoidable problems.

36. The union argues that the overlap in duties is not anywhere serious enough to warrant separate bargaining units. Although it is tempting to categorize the duties involved in the reception of patients and dealing with them on the phone as peripheral or incidental to the nurses' role, it is not easy to do so in this office context. More importantly, even if incidental in content, the evidence shows that these duties are not incidental in terms of time, taking up at least 40 percent of the nurses' time (the most conservative estimate). We are cognizant of the fact that R.N.'s and R.N.A's and other groups in health care arguably share an equal amount of overlapping work and are in different bargaining units in many situations. There are many historical reasons for this, but the situation is not without its problems, as the recent cases on topic have pointed out. In any event, in other contexts, this amount of overlap would be considered the kind of functional integration that argues against separate units.

37. The union submits that section 3 considerations mean we should be guided by the employees' preference for bargaining without the nurses and that any problems are outweighed by these considerations. Counsel asked us to consider the degree to which the proposed bargaining unit would enhance access to meaningful collective bargaining opportunities. Although we are pre-

pared to accept that the applicant's proposed unit accords with the preference of those it represents, we have no basis to find that it is necessary for access to meaningful collective bargaining. There is nothing in the material before us from which we can conclude that an all-employee bargaining would be a serious impediment to collective bargaining. Nor is there any applicable collective bargaining history of which we were made aware from which we could draw any general inferences to that effect. Health care workplaces in this province are organized to a very significant extent. The broader unit would be contained at the same site and is not particularly large in itself; thus, it does not present the obvious difficulties for organizing that multi-branch units have presented in other sectors. We have no indication of particular difficulties in this or other medical centres to act as a counterweight in our balancing of the interests involved here. In the circumstances, we are not prepared to find that access to organizing is a strong factor in this case. Nonetheless, it is worth noting that the Board's jurisprudence shows that where access to organizing is in jeopardy, it will be a factor of significant weight.

38. As to the aspect of self-determination per se, we have no basis on which to make a finding that these employees will be any less able to pursue their rights in the context of a broader unit or that their choice of bargaining agent as opposed to their preference for a particular bargaining unit, will be compromised.

39. For the reasons set out above, we are of the view that there are serious labour relations problems likely to be created by the proposed bargaining unit. In terms of Board decisions, this is a new area of the health care sector. We find that it is not appropriate in the factual circumstances of this case, in particular, the extent of integration between the two groups, to start off on the basis that R.N.'s should be excluded on a presumptive basis in the face of the labour relations problems indicated, as we have explained above. Thus, we find that the applicant's proposed unit is not the appropriate one for this application.

40. Given the applicant's level of support measured against the wider unit, this application is dismissed.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; September 30, 1993

1. I am in total disagreement with the conclusion reached by the majority in this case.

2. I am appalled that it has taken from April 16, 1993 until mid-September to issue a decision on a certification application that was filed by the applicant on July 27, 1992. I will only say "*labour relations delayed is labour relations denied*".

3. In this case the Board is asked to decide whether the unit proposed by the applicant is an appropriate bargaining unit. The Board is *not* being asked to find the most appropriate bargaining unit as has been found by the majority in its decision.

4. In my opinion, the majority decision is premised on *assumptions only* i.e. fragmentation, community of interest, and serious labour relations difficulties which will only come into play "if" and "when" the *two* (2) full-time nurses and *six* (6) part-time nurses decide to become unionized, and should not be the factor that the majority uses to reach their decision.

5. The majority decision clearly denies a group of office employees a choice of being organized by a trade union of their choice into a viable bargaining unit that would not cause serious labour relations problems. If it did, and then that presumption is a large leap of faith, is that not what collective bargaining is all about?

6. The one telling reason that R.N.'s should not be in the bargaining unit which is stated at paragraph 8 of the majority decision, which reads as follows:

"...There was testimony from a registered nurse to the effect that she would *immediately report to management* any non-nursing personnel found performing nursing functions."

(my emphasis added)

It is obvious that nurses view themselves as different and separate. Why should the Board find otherwise?

7. At paragraph 10 of the majority decision it reads as follows:

"Direct supervision and scheduling of clerical is done by Fernanda Gillis, the office manager. ...Scheduling for the nurses and the clerical staff is done separately..."

It is obvious to me the respondent views two separate groups. Why should this Board do otherwise?

8. Therefore, the only reason the respondent is arguing to have an all employee unit is that there is a much greater chance to thwart this organizing drive by adding as many as possible into a bargaining unit thus lowering the support hopefully below the numbers required for certification which is exactly what has happened in this case. If one assumes that the applicant had support that with or without adding the R.N.s in the bargaining unit the applicant was certifiable, the respondent I suggest would not have objected. I suggest that if the majority had to decide whether to sweep the R.N.'s into the bargaining unit (without any R.N. support) they would not. Further, had the R.N.'s brought a certification application *first* they would have received an R.N. only bargaining unit.

9. I fully endorse the reasons expounded by the applicant's counsel at paragraph 12 of the majority decision. When one takes the majority decision and balances it against the rights of employees to freedom of association and the right to organize, one would have to agree with the applicant's position.

10. Finally, it is my opinion, that the majority based their decision solely on assumption and have ignored the real world of labour relations. I would have granted the applicant's proposed bargaining unit thereby facilitating access to collective bargaining rather than totally denying collective bargaining to employees who wish to join a union and thus participate.

3506-92-U Canadian Union of Public Employees Local 1605, Applicant v. Mohawk Hospital Services Inc., Responding Party

Change in Working Conditions - *Hospital Labour Disputes Arbitration Act* - Unfair Labour Practice - Union alleging that employer breaching statutory “freeze” by altering hours of work of employees without its consent - Board satisfied that nothing in collective agreement or long-standing scheduling practice precluding the scheduling changes complained of - Applications dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. A. Rundle* and *C. McDonald*.

APPEARANCES: *B. Sheehan* and *J. Jarvie* for the applicant; *M. J. Zega*, *B. Belanger* and *M. McCombe* for the responding party.

DECISION OF THE BOARD; September 8, 1993

1. This application was heard by the Board on April 13 and 14, 1993. Upon hearing the evidence and representations of the parties, the Board indicated that it would reserve its decision to afford the parties an opportunity to settle the matter between themselves (which is always preferable in labour relations matters), in light of what had been heard at the hearing.

2. Unfortunately, the parties have been unable to come to a settlement and have requested that the Board issue a decision.

3. The applicant trade union is the bargaining agent for employees of the responding employer Mohawk Hospital Services Inc. (“Mohawk”) in two bargaining units, one consisting of full-time employees and one of part-time employees. The applicant has represented the full-time bargaining unit employees for some time (precisely how long has not been specified in the pleadings or evidence). It has represented the part-time bargaining unit since March 19, 1992. The collective bargaining relationship between the parties is governed by the *Hospital Labour Disputes Arbitration Act*. The applicant complains that Mohawk has breached section 13 of the *Hospital Labour Disputes Arbitration Act* by altering the hours of work of employees in the bargaining units without its consent. Mohawk denies that it has done anything wrong.

4. Mohawk acknowledges that section 13 of the *Hospital Labour Disputes Arbitration Act* was in effect at all material times and that it has made scheduling changes. However, Mohawk asserts that it was entitled to make the changes and that it had legitimate economic and business reasons for doing so, particularly in the context of the delays which plague the *Hospital Labour Disputes Arbitration Act* collective bargaining process. Mohawk denies that it has acted in a manner contrary to section 13 of the *Hospital Labour Disputes Arbitration Act*.

5. Mohawk is a “not-for-profit operation” located in Hamilton. It was established in the early 1970’s by seven local area hospitals as a cooperative venture to provide a central hospital laundry facility. Mohawk was actually incorporated as a not-for-profit corporation without share capital in the fall of 1972. With the cooperation and assistance of the Ministry of Health, debentures were issued to raise the necessary start-up capital. In agreement with the Ministry of Health, the founding hospitals entered into twenty year contract with Mohawk which guaranteed their laundry costs. Subsequently, other hospital “customers” were added. At the time of this proceeding, Mohawk had 17 major clients and several smaller ones.

6. When the original twenty year contracts expired in October 1992, Mohawk found itself

fully at the mercy of the marketplace. At the same time, Mohawk's clients were under increased fiscal pressure as a result of cut-backs in government funding in the health care sector. In turn, they began to press Mohawk to reduce its charges, and some began to put their laundry service work out to tender.

7. The nature of the hospital laundry business is such that an increase in volume reduces unit costs, while a decrease in volume increases unit costs. Consequently, additions to the customer base or in volume tend to increase Mohawk's ability to compete, while a loss of customers or a reduction in volume tends to decrease its competitiveness.

8. Mohawk concluded that it could reduce its unit costs by reducing its fixed costs, thereby enhancing its ability to compete. It considered a number of cost saving measures in that respect, including, for example, closing on statutory holidays and Sundays. It also considered lay-offs but concluded that this was neither a preferred option, nor one which would necessarily enhance its competitive position. Ultimately, Mohawk concluded that it could reduce supervisory, maintenance, on-call, and trucking costs by changing the work schedules of its employees.

9. For some twenty years prior to March 29, 1993, when the scheduling changes were implemented, the majority of Mohawk's full-time employees worked on a schedule of 10 hours per day for 4 days, followed by 4 days off. The exceptions to this are not significant in the context of this application. Part-time employees have never had a "schedule" as such. They have been used to supplement the full-time workforce or to replace absent full-time employees. Part-time employees have always been employed on an "on-call" basis. That is, Mohawk assesses the need for part-time workers on a daily basis and calls them in as needed, solely on the basis of their availability. The details of how this on-call system operates on a day-to-day basis are not before the Board.

10. Effective March 29, 1993, Mohawk changed the hours of work by moving to a system of two, seven and a half hours per day, 5 days per week non-rotating shifts. No full-time employees have been laid-off and the scheduling change has not resulted in any loss of hours to full-time employees, although the distribution of their hours is different and this undoubtedly has had an impact on them. However, the scheduling change has resulted, or is projected to result, in a reduction in supervisory, maintenance and part-time on-call expenses which Mohawk estimates will result in an annual saving of approximately \$300,000.00. For part-time employees it means less work, although no part-time employees have actually been laid-off.

11. The applicant refused to consent to or participate in this scheduling change, which is expected to be a "permanent" change, rather than a "temporary" one instituted to, for example, avoid lay-offs.

12. Mohawk did advise the applicant of its plan to change the manner in which it schedules its employees, and the reasons for it. The Board is satisfied that Mohawk acted reasonably in that respect. The Board is also satisfied that Mohawk was trying to respond to the market and economy in which it found itself in the way it perceived was most appropriate, and that no part of its motivation for doing so was improper.

13. Articles 5 and 19 of the most recent collective agreement between the parties with respect to the full-time bargaining unit provide that:

ARTICLE 5 - ADMINISTRATION RIGHTS

5.01 Except as specifically abridged, delegated, granted or modified by this Agreement, all the rights, powers, and authority of the Administration are retained by the Administration and remain exclusively and without limitation within the rights of the Administration.

5.2 Without limiting the generality of the foregoing, the Administration rights include:

- (a) the direction of the working forces, the right to plan, direct and control the operation of the Company; the right to introduce new and improved methods, facilities, equipment, the amount of supervision necessary, combining or splitting up departments, *work schedules*, establishment of standards of performance, the determination of the extent to which the Company will be operated and the increase or decrease in employment;
- (b) the sole and exclusive jurisdiction over all operations, buildings, machinery and equipment is vested in the Company.

5.03 In addition to the Administration's rights include:

- (a) the right to maintain order, discipline and efficiency and in connection therewith, to make, alter and enforce from time to time rules and regulations, policies and practices, to be observed by its employees and the right to discipline or dismiss employees for just cause;
- (b) the right to select, hire, discipline, dismiss, transfer, assign to shifts, promote, demote, classify, lay-off, recall and suspend employees and select employees for positions not covered by this Agreement;
- (c) the exercise of any of these rights will not be inconsistent with the provisions of this Agreement, nor shall these rights be used in a manner which would deprive any present employee of his employment except through just cause.

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ARTICLE 19 - STANDARD HOURS OF WORK AND OVERTIME

19.01 *The provisions of this Article 19 shall not be construed to be a guarantee of or limitation upon the number of hours to be worked per day or per week or otherwise.*

19.02 The parties hereto recognize that there is in effect at the Company what is commonly referred to as a "*flexible working schedule*". *The standard day is ten (10) hours of work per day.*

An employee's yearly schedule is made up of regularly scheduled days, recognized holidays, and vacation time. Any short fall between the schedule and *1950 annual paid hours* is compensated for by "make-up" days worked at the standard straight time rate of pay. It is acknowledged that the number of such "make-up" days may change from year to year for any employee.

19.03 Commencing at the beginning of the new working schedule for 1988/89, an employee working on the "flexible working schedule" will be paid overtime at the rate of time and one-half (1.5) his standard hourly rate of pay exclusive of premiums for any hours worked on days worked over and above the total of the employee's yearly schedule and "make-up" days required in the employee's yearly schedule.

It is understood that "make-up" days will continue to be paid as noted in Article 19.02.

19.04 An employee will at his request and in lieu of 19.03 be paid overtime at the rate of time and one-half (1.5) his standard hourly rate of pay exclusive of premiums for each hour worked in excess of ten (10) straight time hours in the day except and by authority of the President when an employee is requested to work overtime in excess of the regularly scheduled hours on a recognized Holiday such employee will be paid twice his standard hourly rate of pay exclusive of premiums for each hour or part of an hour worked beyond his regularly scheduled working hours.

19.05 *For those not working a "flexible working schedule", as defined in Article 19.02, the standard hours of work will be an average of thirty-seven and one-half (37.5) hours per week consist-*

ing of seven and one-half (7.5) hours per shifts exclusive of one-half (1/2) hour unpaid meal period.

19.06 Effective on date of signing of the Agreement, a shift premium of forty-five cents (\$0.45) per hour will be paid for each scheduled hour worked before 6:00 a.m. or after 6:00 p.m.

Shift premiums shall not be paid if the employee's hours of work before 6:00 a.m. or after 6:00 p.m. are overtime.

19.07 Employees shall be permitted a fifteen (15) minute paid rest period in both the first half and the second half of their shift.

[emphasis added]

The parties are still negotiating a first collective agreement with respect to the part-time unit.

14. Section 13 of the *Hospital Labour Dispute Arbitration Act* provides that:

13. Notwithstanding subsection 81(1) of the *Labour Relations Act*, where notice has been given under section 14 or 54 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

Section 81(1) of the *Labour Relations Act* is an analogous provision. It provides that:

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

Section 81(3) of the *Labour Relations Act* provides that:

(3) Where notice has been given under section 54 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 45 applies with necessary modifications thereto.

15. Section 13 of the *Hospital Labour Disputes Arbitration Act* and section 81 of the *Labour Relations Act* are strict liability provisions in that an employer or trade union need not be improperly motivated for its actions to be in breach of either of them (see *Beaver Electronics Ltd.*, [1974] OLRB Rep. March 120; *The Wellesley Hospital*, [1976] OLRB Rep. July 364; *Kodak Canada Ltd.*, [1977] OLRB Rep. Aug. 517).

16. Commonly referred to as “freeze” provisions, section 13 of the *Hospital Labour Disputes Arbitration Act* and section 81(1) of the *Labour Relations Act* prohibit both an employer and the trade union which represents that employer’s employees from altering anything which affects the employment of those employees where (as in this case) an appropriate notice to bargain has been given, unless its collective bargaining partner consents. The purpose of these provisions is to provide a stable point of departure for collective bargaining, thereby facilitating the collective bargaining process, by maintaining the working conditions and circumstances in place when the freeze is triggered. This serves to provide a fixed, though not necessarily static, basis for collective bargaining and operates to preclude the unilateral alteration of any bargainable aspect of the employment *status quo* which might give one party an advantage in negotiations.

17. It is apparent from the opening words of section 13 of the *Hospital Labour Disputes Arbitration Act* that it not only prevails over section 81(1) of the *Labour Relations Act* but that section 13 replaces section 81(1) where the parties are governed by the *Hospital Labour Disputes Arbitration Act*. However, section 81(3) (**like** section 81(2), which is not applicable in this case) of the *Labour Relations Act* continues to apply to parties governed by the *Hospital Labour Disputes Arbitration Act*. Among other things, this provides for the arbitration of disputes concerning an alleged breach of section 13 (as an alternative to an application at this Board) and for the arbitration of grievances with respect to disputes which arose either before or after the expired collective agreement which preceded the freeze period (*Hamilton Civic Hospital*, [1983] OLRB Rep. March 371).

18. Although the “freeze” label has stuck, it may be somewhat of a misnomer. The words of section 13 of the *Hospital Labour Disputes Arbitration Act* and section 81(1) of the *Labour Relations Act* might be read to mean that there can be no change in anything which affects employment during the specified period. However, the Board has interpreted these provisions as operating to preserve the pattern of employment which exists when they come into effect, rather than specific terms, conditions or other circumstances of employment. Consequently, both the employer and the trade union continue to be entitled to operate within the parameters of the established pattern.

19. To put it in a way more applicable to this case, the Board has interpreted the “freeze” provisions in a manner which recognizes an employer’s right to continue to manage its operations in accordance with the pattern of rights, privileges and duties which touch upon the employment relationships governed by its collective bargaining relationship with a trade union. For example, it is clear from the Board’s jurisprudence that the statutory freeze, whether under the *Hospital Labour Disputes Arbitration Act* or the *Labour Relations Act*, preserves the rights which could have been exercised under the most recently expired collective agreement (see *Women’s College Hospital*, [1981] OLRB Rep. May 597, for example), particularly in response to changes in market conditions or operational requirements (see, *Molsons Brewery (Ontario) Limited, Toronto*, [1977] OLRB Rep. Aug. 526; *AES Data Limited*, [1979] OLRB Rep. May 368). This was described in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859 as a “business as before” approach to the statutory freeze. As the Board’s subsequent jurisprudence demonstrates, this is not always an easy test to apply. Nor does it always lead to an obvious result. For example, the Board has found that the “freeze” provisions do not necessarily preclude first-time events (see, *Grey Owen Sound Home for the Aged*, [1983] OLRB Rep. April 522 where lay-offs occurred for the first time

during the freeze; *Corporation of the Town of Petrolia*, [1981] OLRB Rep. March 261 where work was contracted out for the first time during the freeze). In an attempt to clarify the “business as before” approach, and to accommodate first-time events and delays in the collective bargaining process, the Board developed the “reasonable expectations” test. Although reasonable expectations language appeared in earlier decisions, the first express articulation of this test appears in *Simpsons Limited*, [1985] OLRB Rep. Apr. 594, where the Board explained (at paragraphs 32 and 33) that:

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the the Town of Petrolia*, *supra*; *Scarborough Centenary Hospital*, *supra*; *Oshawa General Hospital*, *York-Finch Hospital*, *supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited*, [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs, in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonable expect such an occurrence during the freeze. The Board in *Simpsons*, *supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern. See also *Royal Ottawa Health Care Groups*, [1992] OLRB Rep. Nov. 1222).

20. In the result, the Board has taken a flexible, purposive labour relations approach to the statutory freeze under both the *Hospital Labour Disputes Arbitration Act* and the *Labour Relations Act*. It could be argued that the statutory freeze contemplates a deeper or more static freeze, but the Board's approach recognizes that employment relationships tend to reflect the dynamic nature of business activity, and is more responsive to the variety of situations and collective bargaining relationships which are presented to the Board. In that respect, we note that the Canada Labour Relations Board tried and subsequently rejected the static freeze approach in favour of a “business as usual” approach (see *Bank of Nova Scotia (Sherbrooke and Rock Forest, Quebec)* (1982), 42 di 398, 82 CLLC ¶16,158; *aff'd sub nom. Bank of Nova Scotia v Retail Clerks Int'l Union* (1982), 83 CLLC ¶14,007 (Fed C.A.); *Bank of Nova Scotia, Toronto, Ontario* [1982] 2 Can L.R.B.R. 21 (CLRB)). The “business as usual” approach has also been applied to the statutory freeze legislation in British Columbia, Nova Scotia, Newfoundland, and in the United States by the National Labour Relations Board. Further, the operative words of section 81(1) of the *Labour Relations Act*, which are the same as in section 13 of the *Hospital Labour Disputes Arbitration Act* and suggest that the same approach is appropriate, have emerged intact from the recent comprehensive review and revision of the *Labour Relations Act*. Since the Legislature must be taken to be aware of the Board's “freeze” jurisprudence, it evidently approves of the “business as usual/reasonable expectations” approach.

21. In a first collective agreement situation (that is, after a trade union acquires bargaining rights but before the first agreement is in place), the pattern of employment relevant for statutory freeze purposes is established by the employer's direct dealings with the employees. Subsequently, as collective agreements are negotiated and the collective bargaining relationship matures, the col-

lective bargaining partners establish the relevant pattern of employment through their dealings with each other. The limits on what an employer (or trade union) is entitled to or must do during a freeze period subsequent to a first collective agreement depend primarily upon what the parties have negotiated before (as set out in the collective agreements between them - particularly the most recent one), and how they have conducted themselves under previous collective agreements and during previous negotiations.

22. We have already alluded to the delays endemic in the collective bargaining process under the *Hospital Labour Disputes Arbitration Act*. It is not uncommon for it to take years to conclude a collective agreement through that process and for a collective agreement so concluded to be near expiry or even already expired by the time it is finalized. Unlike the freeze under the *Labour Relations Act*, a *Hospital Labour Disputes Arbitration Act* freeze cannot be brought to an end before a new collective agreement is finalized, unless the trade union's right to represent the employees in question has been terminated. In these circumstances, it is even more important for an employer and trade union subject to a *Hospital Labour Disputes Arbitration Act* freeze to be able to operate within the pattern of employment established prior to the onset of the freeze in these circumstances, and suggests that a dynamic approach to the freeze is appropriate.

23. The positions of the parties in this case reflect the approach often taken by parties in "freeze" cases. Both parties submitted that the disposition of this application should turn on the provisions of the most recent expired full-time collective agreement. Although both parties formulated their positions in terms of what employees could reasonably have expected in light of the provisions of that collective agreement, the real focus of the dispute between them was whether Mohawk was entitled to make the scheduling change it had implemented pursuant to the recently expired full-time collective agreement. Consequently, the applicant submitted that the collective agreement established the "10 hours per day, 4 days on, 4 days off" work schedule as the standard working day which Mohawk could not change to another standard working day without its consent, and that employees would reasonably have expected that work schedule to remain in place during the freeze. Mohawk submitted that the collective agreement contemplated the possibility of precisely the scheduling change it had made, and that it was therefore entitled to make the change as a reasonable response to the economic and business exigency which it faced.

24. The applicant referred the Board to a number of arbitration decisions in support of its position. These decisions, and the arbitral jurisprudence in general, stand for the rather trite proposition that where an employer retains a broad power to "direct its working forces", it is entitled to alter the working hours, shifts or schedules of employees, except to the extent that its right to do so is limited by clear language in a collective agreement, or a previous practice or representation which has induced the union to refrain from enforcing an applicable right in that respect. The arbitral jurisprudence is less clear with respect to collective agreement language like "normal", "regular" or "standard" to describe hours of work. What an employer can or cannot do in the face of this kind of language depends on the specific wording of the collective agreement taken as a whole, and the collective bargaining context.

25. In this case, there is nothing in the evidence which suggests that there was any representation or discussion regarding the manner in which the Article 19, "standard hours of work and overtime" provision is to be applied or interpreted. The Board is satisfied that the most recently expired full-time collective agreement between the parties does indeed represent the bargained pattern of employment to which the section 13 *Hospital Labour Disputes Arbitration Act* statutory freeze applies. That expired collective agreement contains a broad management rights clause (Article 5) which provides the context within which Article 19 must be read. Article 19 stipulates that nothing in it is intended to establish any limits with respect to the number of hours which can or

must be worked by employees, other than on an annual basis. Further, while it recognizes the “10 hours per day, 4 days on, 4 days off” schedule previously in effect, Article 19 also specifically contemplates that there may be employees scheduled to work five, 7½ hour days per week; that is, the schedule which the applicant complains about herein. Nor does Article 19 place any limit on the number of employees which can be put on this second “standard hours of work” schedule, or when or for how long employees can be scheduled in that way.

26. In the face of Articles 5, 19.1 and 19.5, Article 19.2 does not, either standing alone or in conjunction with the previous long-standing scheduling practice preclude the scheduling change complained of herein. Taken as a whole, Article 19 specifies two possible “standard” work schedules, without limitation as to when or in what manner or circumstances they may be implemented by Mohawk. In all the circumstances, including the provisions of the most recent collective agreement between the parties and the fact that some employees (albeit few in number) have previously been regularly scheduled in accordance with Article 19.5, in the context of the current economic circumstances, the scheduling change implemented by Mohawk was within the reasonable expectations of all concerned, notwithstanding the previous scheduling practice. There is no suggestion in the evidence that such a change was not contemplated.

27. Board is satisfied that Mohawk had the right to make the scheduling change complained of herein and that there was nothing which limited its right to do so. The Board is therefor satisfied that Mohawk has not breached section 13 of the *Hospital Labour Disputes Arbitration Act* as alleged by the applicant with respect to the full-time bargaining unit employees.

28. Part-time employees have never had guarantees of any kind in terms of the hours of work or how these might be scheduled. The on-call scheduling has always been at the complete discretion of Mohawk. To the extent that there was a pattern to the scheduling of part-time employees, it mirrored that of full-time employees. (Indeed that was the way both parties approached the case.) In that respect, Mohawk is not scheduling part-time employees any differently now than before. The fact that the part-time employees have selected the applicant as the bargaining agent gives them no greater right or privileges with respect to scheduling than they had before. The Board is satisfied that there has been no breach of section 13 of the *Hospital Labour Disputes Arbitration Act* with respect to part-time employees either.

29. In the result, this application is dismissed.

1665-93-M Retail, Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 414, Applicant v. **New Dominion Stores**, a division of the Great Atlantic and Pacific Company of Canada, Limited and Retail Wholesale and Department Store Union, AFL-CIO-CLC, Responding Parties

Interference in Trade Unions - Interim Relief - Remedies - Unfair Labour Practice - Union Successor Status - USWA filing complaint alleging employer interference in union activity and making request for interim relief - Application for interim relief made in context of continuing dispute between USWA and RWDSU over who represents employees of employer, and in context of earlier interim Board order directing that employees to continue to be represented in dealings with employer by individual union representatives who had customarily dealt with employment problems prior to July 1993 - Board granting further interim orders in connection with leaves of absence for

union business and other matters in order to ensure that employer does not actively support either union at expense of the other, pending Board's decision in USWA's successor rights application

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. W. Pirrie* and *J. Redshaw*.

APPEARANCES: *James Hayes, Brian Shell, Blaine Donais, T. E. Collins* and *Leo Gerrard*, for the applicant; *Derek L. Rogers, John Peardon* and *Christine MacDonald* for A & P; *Chris G. Paliare, Nick Coleman, John Monger* and *Robin McArthur*, for RWDSU.

DECISION OF THE BOARD; September 2, 1993

1. The applicant has filed a section 91 complaint (Board File No. 1664-93-U) and a related instant application for interim relief. A hearing was held on August 26, 1993. An oral decision issued at its conclusion, which we set out and expand upon here.

2. In order to understand the issues, some awareness of the context is necessary.

3. These same parties have already been engaged in litigation over which trade union now represents employees working at a number of New Dominion/A & P stores in Southern Ontario. On July 23 and 27, 1993, hearings were held before the Board (referred to as the "MacDowell" panel) to consider whether an interim order should be granted, until the Board could determine which union did hold bargaining rights. During the hearings A & P took a neutral position as between the competing unions, and expressed its serious concern that it be allowed to continue to manage labour relations at the stores in question, and that the employees affected in the stores not have their rights adversely affected.

4. The MacDowell panel issued a decision on July 29, 1993, in which it made two directions:

- (1) Until the Board determines which trade union has bargaining rights for and is entitled to represent the employees of New Dominion A & P stores in its Southern Ontario stores, and unless the Board otherwise directs, the employees at each store will continue to be represented in their dealings with their employer by the individual union representative(s) who customarily dealt with their employment problems prior to July 10, 1993.
- (2) Until the Board determines which union has bargaining rights and is entitled to represent the employees of New Dominion/A & P stores in its Southern Ontario stores, the employer's local store managers and other managerial personnel may continue to deal with the individual union representative(s) with whom they have customarily dealt in respect of employer-employee matters prior to July 10, 1993.

5. The decision also specifically referred to A & P's position:

...

5. The employer and the various unions all submit that it is important that the employees' right to representation not be prejudiced while this case is being considered by the Board.
6. The employer stresses the importance of its being able to carry on business as usual, so that this dispute between trade unions does not interfere with the interests of the employer or the employees.

...

6. The panel also directed that copies of its interim decision be provided to all of the company's store managers and that the decision be posted, immediately, in each store, where it would most likely come to the attention of the employees. Reasons for this interim decision issued August 12, 1993, [now reported at [1993] OLRB Rep. Aug. 783].

7. On August 9, 1993, shortly after this interim decision issued, the Board began to hear the merits of the dispute; that is, the Board began to hear the dispute over which union held bargaining rights for employees at the A & P stores in question. That hearing has concluded. The Board has not yet issued its decision with respect to which union holds the bargaining rights. A decision is anticipated within a few weeks.

8. This then was the situation: the Board had already issued an interim decision, in order to maintain the status quo with respect to representation at the store level until the Board finally determined which union holds bargaining rights, and the parties have already litigated that question and were awaiting a decision of the Board.

9. But the status quo was not maintained.

10. A & P took the position that the Board's prior decision (the MacDowell decision of July 29, 1993) meant that the employees would continue to be dealt with by the individual union representatives who had customarily dealt with them, *but only for the limited purposes of the grievance procedure*, and only if A & P chose to deal with those representatives for those purposes. For its part, the responding union (hereinafter referred to as Retail, Wholesale and Department Store Union, or RWDSU International) advised all of its unit chairpersons across the Province, including those responsible for the A & P stores in question in Southern Ontario, that henceforth its people were responsible for addressing "all contractual or labour related matters which may arise". The people so designated by RWDSU International had not previously represented employees at the local store level.

11. It also appears on the materials before us, that A & P has now abandoned its neutral position.

12. A & P had earlier granted leaves of absence to four individuals, who were working on behalf of the applicant, with some of these leaves of absence granted as recently as July 11, 1993. On July 27, 1993, the last hearing day before the MacDowell panel, RWDSU International requested of A & P that the leaves of absence previously granted to supporters of the applicant be cancelled. Notwithstanding that request, A & P at the time declined to do so, a position consistent with the submissions and position it had taken before the MacDowell panel. A & P did however grant additional leaves of absences to supporters of RWDSU International.

13. Thus, from at least the end of July and through the first half of August, 1993, A & P has granted leaves of absence to supporters of *both* the applicant and RWDSU International; and there can be no doubt, both on the basis of the materials filed and submissions made to the Board by all parties, that both groups of union supporters were using the leaves of absence, at least in substantial part, for political or lobbying purposes. Then, on August 17, 1993, acceding to the earlier request from RWDSU International, A & P cancelled the leaves of absence which it had previously granted to the supporters of the applicant, while leaving outstanding the leaves of absence granted to the RWDSU International supporters.

14. After hearing the parties' submissions at the hearing, and recognizing the need for a expeditious response in the circumstances, the Board at the hearing granted certain remedial relief.

15. We were satisfied that the responding parties had not been following the prior decision of the Board in all respects, whether through inadvertence, confusion or intention to subvert. In that regard (and notwithstanding some serious reservations about the Board intruding on what, at least in part, can be characterized as internal union matters), we were satisfied that it was appropriate to make further interim directions in order to clarify or simplify the prior decision of the MacDowell panel and to ensure that the *statutory rights of the participants were protected*. Any confusion or possible misunderstanding by the parties can thereby be eliminated.

16. But quite apart from problems which continued to exist despite the decision of the MacDowell panel, and as noted above, there have been other changes at the A & P stores in question, particularly with respect to the position and actions of A & P. These were not matters previously before the Board. There was no allegation before the MacDowell panel that the employer had departed from a position of strict neutrality. Indeed, A & P's position was that it wanted to remain neutral; and the MacDowell panel appears to have accepted that position and responded accordingly.

17. The Board was satisfied that these facts (largely undisputed we might add), justify further interim relief. The applicant has pleaded, at the very least, an arguable case that A & P has engaged in unlawful, discriminatory activity, in its cancellation of the leaves of absence to the applicant's supporters, while granting and maintaining leaves of absence for the supporters of RWDSU International.

18. This is not an internal union matter. Rather, this is a question of ensuring that the rights of employees and unions under the *Labour Relations Act* are protected. It is a question of ensuring that the employees have the ability to choose freely between potential bargaining agents, and that potential bargaining agents have not unfairly been discriminated against with respect to access to employees.

19. We recognize that the circumstances before us are somewhat unique, in that the Board's decision (which the parties are currently awaiting) will likely determine which of the unions before us will be entitled to continue to exclusively represent the employees in question. It may be that access to employees during the intervening period, while awaiting such decision, has no practical significance. However, at this stage, it is more likely that there may be some practical ramifications arising from access to employees, and the ability to politic and lobby at the workplace pending the the Board's final decision. In these circumstances, and given that the Board's decision is likely to issue in the near future, the Board considered it appropriate to ensure that during the intervening period the employer does not actively support either union at the expense of the other.

20. Accordingly, and as directed at the hearing on August 26, 1993, the Board granted the following relief:

1. The Board directs that those individual unions representatives who have customarily dealt with the day to day employment issues or problems in the workplace, prior to July 10, 1993, shall continue exclusively to be able to deal with them.
2. With respect to the four individuals whose leaves of absence were rescinded by A & P, those leaves are to be reinstated forthwith, on the terms and conditions under which the leaves were originally granted, as if the leaves of absence had never been rescinded.
3. All notices to any persons purporting to confer authority contrary to

the Board's decision herein and the Board's directions of July 29, 1993 are to be withdrawn by the parties who issued them. In this respect, the parties might direct their attention to the material filed at Tabs 9, 11, 13, and 14 of the Exhibit Book filed by the applicant.

4. The company is directed to send copies of this decision to all of the company's store managers and this decision is to be posted immediately in each store, where it will most likely come to the attention of the employees.
5. These orders are limited to the A & P stores where the applicant is involved.
6. These orders or directions are to apply until the decision on the merits issues and concludes otherwise, or until the Board otherwise directs.

21. The intent of these orders is to ensure that employment related problems arising at the store level continue to be dealt with by the union people who had customarily dealt with them prior to July 10, 1993. Our direction is not restricted to the grievance procedure, but is intended to maintain the general status quo with respect to employment problems and union representation at the local store level. This arrangement will ensure that employee representation rights do not suffer while awaiting the Board's decision on the merits. That decision will likely decide which union is entitled exclusively to represent the employees in question, in which case that decision will supersede in those respects our decision given herein. But until then, or until the Board otherwise declares, the customary people are entitled to service the bargaining unit employees as they did before, and A & P is required to deal with these people. Given the imposition of the trusteeship, there may as a practical matter arise problems which realistically require all the parties to agree to defer their resolution until the Board's final decision issues. However, that is a matter of agreement between the parties.

22. Again, as did the MacDowell panel, we wish to emphasize that the Board does not support or prefer one union over another. Those sorts of decisions are not for us to make, nor should we be commenting in any respect on those decisions. What is our responsibility however, is to ensure that statutory rights set out in the *Labour Relations Act* are preserved pending a resolution of this dispute. Here, interim relief was necessary in order to fulfil that purpose.

23. We have issued these reasons quickly, in order to be able to quickly notify employees affected of the circumstances, and hopefully thereby to reduce the obvious confusion and uncertainty in the workplace, and to lessen the likelihood of further problems needing Board intervention. More complete reasons may follow at a later date.

1248-93-R; 1346-93-U Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414, Applicant v. **The Great Atlantic & Pacific Company of Canada, Limited**, Responding Party v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its local affiliates Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, 429, 545, 579, 582, 915 and 991, Intervenor; Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 461, 1000, Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, and the United Steelworkers of America, Applicants v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Responding Party

Bargaining Rights - Union Successor Status - Various locals of RWDSU rejecting proposed merger with UFCW, disaffiliating from RWDSU, amalgamating with each other to form RWDSU/Canada, and merging with USWA to form Canadian Service Sector Division of USWA - Board declaring USWA to have acquired rights, privileges and duties of its predecessors

BEFORE: *Judith McCormack*, Chair.

APPEARANCES: *James K. A. Hayes, Paul Cavalluzzo, David Matheson, Brian Shell, Blaine Donais, T. E. Collins* and *Leo Gerard* for the applicants; *Derek L. Rogers, R. M. Parry, T. A. Zakrzewski* and *Chris MacDonald* for the responding party *The Great Atlantic & Pacific Company of Canada, Limited*; *Chris G. Paliare, John Monger* and *Lenore Miller* for RWDSU, intervenor/responding party.

DECISION OF THE BOARD; September 23, 1993

1. The name of the responding party is amended to read: "The Great Atlantic & Pacific Company of Canada, Limited".
2. This is an application under section 63 for a declaration that Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414 is the successor to Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414 with respect to a bargaining unit employed by The Great Atlantic & Pacific Company of Canada, Limited. The applicant has also filed a complaint under section 91 alleging that Retail, Wholesale and Department Store Union, AFL-CIO-CLC ("the International" or "RWDSU") has violated the Act by various activities.

I. FACTS

3. Before turning to the sequence of events in this case, some background information is helpful. Local 414 has approximately 9,000 members of whom some 5,000 work in the bargaining unit which is the subject of these proceedings. At the beginning of these events, it was an affiliated local of the International. As one of six large composite locals in southern Ontario, it included some 200 bargaining units. These composite locals are organized by the nature of the workplaces involved. For example, Local 440 is the dairy and general workers local for the province, Local 461 is the bakery and confectionery workers local, Local 448 is the hotel and restaurant workers local, Local 1688 is the taxi local, and so forth. There are also four small one plant locals in southern

Ontario. Eight small locals make up the Northern Joint Board, representing members in northern Ontario, and the remaining locals are spread throughout Canada. Together at the time of these events, there were approximately 25,000 employees in RWDSU locals in Canada. Local 414 covers mainly grocery store employees, but also includes employees in warehouses, pharmacies, offices, etc.

4. The International is governed by an International Executive Board which has some 34 representatives, including six Canadian Vice-Presidents. Of those, one is the Canadian Director of the union. At the time of these events, the Canadian Director was Tom Collins, and the other Canadian Vice-Presidents were Bruce Prozyk, James Donnelly, Tom Pickford, Robin McArthur and Jim Waters. The latter is also the President of Local 414.

5. The Canadian locals of RWDSU have their own umbrella organization which is called the Canadian District Council of the Retail, Wholesale and Department Store Union AFL-CIO-CLC. The Canadian District Council has been a chartered body of the International for approximately 13 years and it has its own by-laws and Steering Committee. Members of the Steering Committee include the Canadian Director, who is elected by a Canadian convention and who is the Director of the Steering Committee, six regional elected representatives and four representatives appointed by the Canadian Director. The Canadian District Council holds biannual conventions, and the Steering Committee meets between conventions.

6. Local 414 has its own by-laws as well. It is divided into nine geographic areas which elect approximately 150 delegates to its conventions, based on a formula set out in the by-laws which relates to the number of members involved. The convention as a whole elects officers to the Local Executive Board, while the delegates for each area elect representatives to that Board for their respective areas. These by-laws also stipulate that the Local Executive Board of Local 414 following the direction of the Local Director has the final power and authority between conventions.

7. The events which led to these applications commenced for all practical purposes in 1990. At a Canadian Labour Congress convention, Lenore Miller, President of the International met with the six Canadian Vice-Presidents to solicit their opinions with respect to a merger of the International. Five of the six were strongly opposed. At the 1990 International convention which followed, Mr. Collins was elected as the Canadian Director, which among other things meant that he was a member of the International Executive Board. In September of 1991, the International Executive Board considered the issue of merger with the United Food and Commercial Workers ("UFCW") and decided to appoint a committee to explore the matter further. This time, all of the Canadian Vice-Presidents voted against the idea.

8. At that point, Mr. Collins and the other Canadian Vice-Presidents felt that they should get a more concrete sense of the views of the Canadian locals with respect to merging with the UFCW. A meeting of the Canadian District Council Steering Committee was held, and they decided to put forward a motion at the Canadian District Council convention in October of that year. In fact, the resolution was put forward by both the Steering Committee and eleven locals listed on it, including Local 414. The gist of the resolution was that the Canadian District Council was opposed to a merger with the UFCW, and the International Executive Board was encouraged to either seek a merger with a more compatible and like minded organization than the UFCW, or to build up the RWDSU. At the convention, all delegates received pro-merger literature. Ms. Miller was in attendance and spoke against the resolution. A number of others, including Mr. Collins and Mr. McArthur spoke for it, and the resolution was passed.

9. The concerns of the Canadian locals about merging with the UFCW are not particularly

relevant, and as a result, there is little point in reciting them in any detail. Suffice it to say that there had been a traditional rivalry between the two unions, and that there had been a number of incidents where the Canadian locals felt that UFCW had interfered with their organizing campaigns, creating considerable bitterness. Some of these concerns were local, for example in eastern Canada where the aftermath of an inter-union dispute with respect to fishermen meant that some of the RWDSU plants would decertify if the merger went through, according to some eastern locals. Others were more widespread, as in both western Canada and Ontario where some locals felt that UFCW had undermined their negotiating positions. Whether these feelings had any basis in fact is not at issue here, and I make no findings in this regard; what is clear is that the idea of merging with UFCW was not popular with most of the Canadian locals.

10. In October of 1991, Ms. Miller advised Mr. Collins that she was appointing him to the committee of the International Executive Board considering the merger. Shortly after that, the eight members of the committee met with representatives of UFCW in a "get acquainted" meeting. Mr. Collins was the only Canadian on the committee. Cliff Evans, the Canadian Director of UFCW was present at the meeting, at which it was recognized that there were some problems in Canada that he and Mr. Collins would have to discuss. As a result, Mr. Collins and Mr. Evans met in Canada and subsequently exchanged some correspondence. From this it merged that some of these problems might be fixed, and some could not.

11. The next meeting of the merger committee was in January of 1992. At that time, Ms. Miller presented the members with a draft merger proposal. Mr. Collins indicated that he wished to take the proposal back to study it further. However, he was outvoted by the other members of the committee who decided to submit the draft proposal to UFCW. This was followed in October by another meeting at which an outline for discussions was presented to the committee as the basis for the merger. It now included a separate Canadian vote in regard to the merger, about which more will be said later.

12. A meeting of the International Executive Board was scheduled for the following month in Palm Springs. The night before the meeting, the Canadian Vice-Presidents met, along with some of the Canadian staff to discuss the merger. Mr. Collins had already had a number of discussions with staff and various local executive boards as to what they would do if the merger was consummated. He testified that he was continually attempting get a sense of of the consensus of the Canadian locals. As the Canadian Director, his primary objective was to keep the union together in Canada, whatever they decided to do. Mr. Collins advised the Vice-Presidents that if their people turned down the merger, there were two options: continuing on as an independent Canadian union or merging with another union. The Vice-Presidents then discussed possible merger partners. Mr. Collins was in favour of a merger with the United Steelworkers of America ("USWA"), while Mr. McArthur suggested the International Brotherhood of Teamsters. The Canadian Vice-Presidents were unanimous that a merger with UFCW was out of the question.

13. The following day at the International Executive Board meeting, Mr. Collins raised a number of issues with respect to the contents of the merger agreement which he had originally intended to raise at the January Executive Board meeting. He had also prepared a package of items including a number of specific concerns about the UFCW, terms that should be in any merger agreement, and so forth. The next day there was a vote of the International Executive Board, and to the surprise of the other Canadian Vice-Presidents, Mr. McArthur voted in favour of the merger.

14. Mr. Collins then discussed the matter with the other four Canadian Vice-Presidents and decided that he would go back to Canada and review the UFCW merger proposal with the locals.

He subsequently attended meetings with locals in Manitoba, Alberta, Nova Scotia and Ontario. Ms. Miller also called a meeting of approximately seventy-five elected local executive officers in southern Ontario where she reviewed the merger proposal in detail. A number of questions were asked at the meeting which lasted approximately four hours. Ms. Miller concluded by telling them to study the proposal and let her know how they felt about it. Mr. Collins said much the same thing in his meetings with locals across Canada. However, he also expressed his view that merger with USWA would be preferable.

15. The International Executive Board then met in February of 1993 in Atlantic City. At that time, Ms. Miller presented the Board members with a more detailed version of the merger proposal. This version made it clear for the first time that while majority rule would govern the vote of U.S. locals, the Canadian process would include a procedure by which any Canadian locals in favour of the merger could opt in to the result of the American vote. In addition, this document indicated that Canadian locals voting against the merger would be disaffiliated from the RWDSU, a provision which did not apply to any American locals voting against the merger.

16. During this period relationships were becoming increasingly strained, and Mr. Collins began to feel some personal pressure from the International. He told the Board that a watchful eye was being kept on him, new conditions and restrictions were placed on his activities, and attempts were made to dissuade him from talking to others about his view of the merger. He was becoming increasingly worried about the position of the Canadian locals after the UFCW merger vote, as were other members of the Canadian locals who were looking for some protection.

17. In March, Mr. Collins wrote to the International Executive Board setting out some specific concerns about the merger proposal. These included his view that there should be only one convention to discuss the merger so that the Canadian members could attempt to convince some of the Americans of their point of view, that there were constitutional problems with the merger procedure, that Canadians were being treated in a discriminatory fashion because of both the opting in procedure for Canadian locals in favour of the merger and the deemed disaffiliation provision for those against it. He also indicated that a legal challenge would be forthcoming if the International proceeded on the basis of the merger document as it was. At that point, the Canadian locals were considering attempting to enjoin the International from proceeding with the merger process. Mrs. Miller responded in detail and among other things, directed Mr. Collins not to have any conversation about the status of the RWDSU in Canada except in the presence of International officers.

18. An appeal was made to Mr. Collins by some of the other Vice-Presidents on the International Executive Board that he and Ms. Miller should meet to try and resolve the matter because it was apparent that they were on a crash course. As a result, Mr. Collins met with Ms. Miller on March 29th and reviewed the problems involved. The net result was that the process would be going ahead as it was, despite his objections. However, Ms. Miller also asked Mr. Collins what the Canadian locals were going to do, and where they would go. He advised her that they were looking at their various options, and the USWA was mentioned.

19. On March 28, Mr. Collins met with all the local officers in southern Ontario. They unanimously told him to take legal action to prevent the merger, and the following day, six of the larger southern Ontario locals including Local 414 wrote to him authorizing him to take steps to ensure that a fair and equitable merger vote would take place. This apparently reflected some of the concerns Mr. Collins had raised in his letter to Ms. Miller.

20. During the four-month period between April and July 1993, Mr. Collins met with almost every local in the country between two to three times to discuss the UFCW merger and the alternatives to it. In addition, during March and April, Mr. Collins had two meetings with Leo

Gerard, the Canadian Director of the USWA. On April 5, he wrote to Ms. Miller, suggesting as a solution majority votes in each country, and a simple separation rather than disaffiliation if the Canadian majority voted against the merger.

21. Mr. Collins then continued to meet with locals, who had a number of questions and considerable apprehension with respect to their future. In those meetings, the various options available were discussed. Some were more interested in an independent Canadian union at that point, and others wished to pursue the idea of other merger partners. The financial condition of the Canadian locals was not particularly conducive to continuing on independently. Merger with the USWA was reviewed, as well as the possibility of merging with the new Chemical, Energy and Paperworkers Union. In the meantime, the Canadian locals opposed to the UFCW merger retained counsel to prepare a legal challenge to the merger procedure.

22. On April 7th, 1993, the International Executive Board met and voted in favour of the UFCW merger agreement. Again, five of six Canadian Vice-Presidents voted against it, and this time one American Vice-President did as well, on the basis that he supported the merger but did not approve of how the Canadian locals were being treated. The Board was then advised when the meetings to vote on the merger were to be held. The U.S. locals were to vote on June 12, and the Canadian meeting was scheduled for July 10th. Mr. Collins objected because the meetings were a month apart, apparently to maximize the persuasive power of a positive American vote. Nevertheless, calls for the meetings were sent out by the International to officers and members of local unions, joint councils and joint boards, together with copies of the merger agreement and the UFCW constitution. The notices included a formula for elected delegates that reflected the international constitution requirements in this regard.

23. The next relevant event was the biannual Local 414 convention which was held on May 16 and 17. Guy Dickinson, the International Secretary-Treasurer, and Ms. Miller attended. Ms. Miller distributed copies of the UFCW merger agreement to delegates and described how it would affect Local 414. Mr. Dickinson also spoke about the merger, as did Mr. Collins and several local officers, and questions and discussion followed. Then the delegates, who represented all bargaining units in the local, elected the Local Executive Board officers.

24. With some encouragement from Bob White, President of the Canadian Labour Congress, Mr. Dickinson and Mr. Collins met at the Local 414 convention, and were later joined by Ms. Miller. Surprisingly, this meeting was a positive one and an agreement in principle was worked out. The gist of this agreement was that the Canadian UFCW merger vote would be conducted in accordance with the merger agreement, and locals voting against it would become disaffiliated on October 1st, or such earlier date as a new organization was established. All bargaining rights, contracts, property and so forth of the locals would be transferred with them. All bargaining rights, contracts, and so forth of the International in Canada would be transferred to the new organization. The new organization would be the successor in all the geographic areas and jurisdictions covered by the local unions which were disaffiliated. It would also pay to the International the cost of the legal fees for the taxi organizing campaign if it affiliated with another union within one year. The new organization would accept liability for all costs incurred after formation and the International for all costs before with respect to pensions and other International obligations. This organization was to be called the Retail, Service and Wholesale Union of Canada, and the International and UFCW would support an application by the new union to affiliate with the Canadian Labour Congress and other affiliate bodies. The separation agreement would be subject to ratification by the disaffiliating locals at a delegate meeting called for this purpose.

25. Mr. White attended at the Local 414 convention on May 17th, and told Mr. Collins, Mr.

Dickinson and Ms. Miller that if they were agreed, there would be no problem entering the new organization into the Canadian Labour Congress. Ms. Miller asked Mr. Collins what the Canadian locals would do. He advised her that the day after the vote in Canada, there would be a meeting of the Canadian District Council, and a by-laws or constitutional committee would be struck. They would meet over the summer and review their various options, and then make a recommendation to the Canadian District Council. Mr. Collins testified that it was necessary to use the Canadian District Council as the structure for the locals to decide upon their future because it had by-laws and an elected Steering Committee, and it was the only organization they had, presumably since the International was expected to merge. The matter was left that Ms. Miller would draw up a document incorporating this settlement. This had to be done quickly as the votes were fast approaching, and the Canadian locals were still considering legal action to stop the votes.

26. A meeting was scheduled for May 28th to work out the final details of the separation agreement. On May 27th, Mr. Collins received Ms. Miller's draft agreement which, he testified, was quite different from their earlier discussion. There was no reference in this document to the disaffiliated locals forming a successor organization. On the contrary, the agreement indicated that all authority, power and rights held by the International would remain so vested, that the International would continue in Canada through the Canadian locals voting in favour of the merger, and that it would retain its entitlement to membership, officers, and other positions. (By then it had become apparent that the northern Ontario locals, one local in New Brunswick and one of the single plant southern Ontario locals representing a total of approximately 5,000 members would support the merger. All the other Canadian locals representing approximately 20,000 members were opposed to it.) After the merger, the RWDSU Council of UFCW would become the successor to the International. In addition, if the new union of the Canadian locals sought jurisdiction, affiliation or membership outside Canada or a charter from the AFL-CIO, all its assets and the assets of its locals would be forfeit to the International. All future jurisdictional disputes were to be governed by the International's constitution.

27. More significantly, the Canadian District Council would be dissolved on the effective date of the agreement and all its property and assets would be divided among the locals. All International employees would be discharged or permanently laid off as of the effective date, and the collective agreement with the staff union representing them would be terminated. The new union would be responsible for any claims resulting from these provisions, which Mr. Collins felt might be illegal in Canada. Even before the effective date of the agreement, the International could discharge any employee in its sole discretion. All Canadian Vice-Presidents and all other Canadian members, officers and employees were to resign all their elected or appointed positions, including their positions with affiliate bodies such as the Ontario Federation of Labour and the New Democratic Party on the date of the agreement. More specifically, Mr. Collins was to resign his position on or before July 12. The draft agreement also stipulated that the new union was to assume pension liabilities in the amount of \$800,000. In addition, the laws of the U.S. and New York were deemed to govern the validity, interpretation and performance of the agreement and all legal proceedings were to be brought in New York. The effective date was to be September 30.

28. Although Ms. Miller told Mr. Collins that the draft agreement was negotiable, Mr. Collins was alarmed by the overall picture it presented and by what he felt were crucial differences between the draft and their earlier discussion. It also became clear that the parties were far apart again, and it was left that Ms. Miller would get back to them if there was anything left to discuss.

29. After this meeting, Mr. Collins met with the Canadian locals on the east coast, including those in Newfoundland, Prince Edward Island and Nova Scotia. At that time, they discussed

what they were going to do, and that whatever it was would have to be done right after the July 12th vote, because otherwise it was Mr. Collins' view that the International would be taking them apart. He also indicated that they should adopt a new constitution, based on the International constitution, and that he would be recommending a merger with the USWA.

30. When he returned to Toronto, he received a letter from Ms. Miller directing him not to change any names on collective agreements or other documents without prior approval and notification. One of the duties of the Canadian Director is to assign newly certified bargaining units to the appropriate local, and he was worried that new bargaining units, such as the taxi units, would be assigned by the International elsewhere.

31. Several days later, counsel for the Canadian locals opposing the merger wrote to Ms. Miller setting out what Mr. Collins had understood to be the agreement of May 16 and 17. Ms. Miller wrote back disputing Mr. Collins' understanding of the discussions on May 16 and 17, telling counsel to resign from all RWDSU matters on the basis of conflict of interest, and advising that action would be taken if Mr. Collins acted in a manner conflicting with the International Executive Board decision to merge or his obligations as an employee and director.

32. As relations worsened, Mr. Collins discussed the matter with several of the other Canadian Vice-Presidents. The gist of this discussion was that the draft separation agreement signalled what was going to happen to them after July 10th, and that they were going to have to move quickly because otherwise there would be no vehicle to provide a structure for making decisions about their future. Their concern was that it appeared that the Canadian District Council would be dissolved and all the officers and staff would have their employment terminated. They concluded that they should hold a Canadian District Council meeting the day following the UFCW merger vote to consider their options, including an independent union or a merger, the leading choice being the USWA. Enjoining the UFCW merger vote began to appear less useful, partly because they felt it was better to spend their energies addressing the Canadian situation rather than to try and stop the votes.

33. On June 8, notice of a special meeting of the Canadian District Council was sent to the Canadian locals. It recited the fact that the required number of locals had requested such a meeting (provided for under the Canadian District Council by-laws) which was scheduled for July 11th, the day after the UFCW merger vote. The agenda was set out and included the future of the Canadian District Council and the disposition of its funds. That same day a call was issued for a constitutional convention and a meeting of the Canadian locals and their delegates which were scheduled to immediately follow the Canadian District Council meeting on July 11. The notice indicated that the purpose of this convention and meeting was to decide the future of and the successor organization to the disaffiliating Canadian locals, and set out an agenda including discussion of the future organization and options, adoption of a new name, constitution and officers if applicable, and adoption of a merger proposal if applicable. The notice is signed by the Presidents of the large locals in southern Ontario, including Local 414. Three days later, the U.S. vote on the UFCW merger agreement was held, and the American locals voted in favour of the merger.

34. On June 15, Ms. Miller wrote to a number of employers advising them that Mr. McArthur and only Mr. McArthur was designated to represent the International in collective bargaining. Normally, Mr. McArthur would have had no responsibilities with respect to these bargaining units as they were not in northern Ontario. It was clear from these letters that the International was attempting to assert bargaining rights in regard to the units in question. On June 23rd, Ms. Miller also wrote to Mr. Collins, directing him to consult with her prior to discussing or answering any

grievance filed under the staff union collective agreement. In the meantime, a vigorous exchange of views was occurring in correspondence between the Canadian locals' counsel and Ms. Miller.

35. Between June 3rd and July 5, 1993 Ms. Miller and Jim Waters, the President of Local 414 corresponded as well. Ms. Miller raised the issue of whether there had to be a special convention under Local 414's by-laws to consider the UFCW merger agreement. After some hemming and hawing, Mr. Waters expressed the view that the May convention had fulfilled this requirement, in light of the fact that it was a convention and that the merger agreement had been discussed, although he said the Local executive would consider at their next meeting whether to have another convention. Nothing apparently came of this as no other convention was held and the Local 414 delegates were recognized at the July 10 UFCW merger vote meeting, seated and permitted to vote without objection by the International.

36. In early June, Mr. Collins and Mr. Waters met with all of the executive officers of the major locals in Southern Ontario including Local 414, representing the elected leadership of 16,000 members. They discussed the draft separation agreement, and their concerns about what the International was going to do after July 10th. Mr. Collins gave them information about various unions, but told them that his recommendation would be that they should form a national union and then merge with the USWA. During June, Mr. Collins had been meeting with officials from USWA, and he advised the local executive officers of his discussions. He reviewed the principles which he thought should be in any merger agreement, and told them that he would be putting forward a merger agreement with USWA on July 11th for their approval. Among other things, he advised them that there would be a five year window in the USWA merger with the effect that if the merger did not work out, they would have the right to withdraw during this period of time. Mr. Collins told the Board that he "laid it all out for them" and then obtained their views. During June and the beginning of July, he tried to meet with every local in Canada, and among other things, discussed a merger with USWA with them.

37. On July 6, five days before the special Canadian District Council meeting and the constitutional convention, the International imposed a temporary trusteeship on the Canadian District Council. A hearing was scheduled for July 26 before five American Vice-Presidents on the International Executive Board. The Secretary-Treasurer from Georgia, Mr. Dickinson, was made the temporary trustee. The letter imposing trusteeship cites a lack of three months' notice for the meeting, the requirement that 40% of locals must request such a meeting, and financial malpractice (apparently relating to the placement of the disposition of funds item on the agenda). Mr. Collins subsequently sent copies of the requests for a special meeting of a majority of the locals representing not less than 40% of the membership to the International.

38. The Canadian Director is the delegate for the Canadian District Council at any International conventions. The effect of the trusteeship, among other things, was to disentitle Mr. Collins from voting on the UFCW merger on July 10th, 1993.

39. In the meantime, Mr. Collins continued to meet with locals, showing them the draft separation agreement, and advising them what his recommendations would be on July 11th. He testified that there was considerable anger about the separation agreement, and unanimity with respect to proceeding on July 11th. It was not clear how the locals would vote on July 11th; some of the people he met with had opposed Mr. Collins' election as the Canadian Director, but they were insistent about their right to decide. In these meetings as well, Mr. Collins advised the locals that the new constitution for a national union to merge with USWA would change very little from the current international constitution. He also kept them updated on his discussions with USWA on what should be in the merger agreement. Local autonomy was a particularly important point in

those discussions as the locals were saying that they wanted to continue on as they had done in the past, but within a different framework.

40. On July 10th, the UFCW merger vote meeting in Canada was held. In accordance with the constitution and in conformity with the process in the UFCW merger agreement, it was attended by delegates from locals with credentials certifying them in this regard. Some of them were elected especially for this meeting; most, like Local 414 sent their executive board officers and members as delegates. This was provided for in Local 414's by-laws, and recognized in the meeting notice sent out by the International. In the case of Local 414, those delegates consisted of persons who had been or were still were rank and file employees with many years of combined service in various capacities within the Local.

41. Ms. Miller addressed the merger vote meeting at some length and a brief debate followed. Since the Canadian locals in favour of the merger had already opted in to the American vote, the resulting vote was unanimously against the UFCW merger. The vote was conducted as a roll call vote, where the delegates cast the votes of the number of employees they represented. Based on the formula in the international constitution, the delegates from Local 414 cast the 9,111 votes of their members.

42. The next day, the special meeting of the Canadian District Council was not convened, because the Council had been placed under trusteeship. Rather, the delegates who were the same as those the previous day but who had been separately certified as delegates by each local for July 11th, convened the constitutional convention and special meeting of all locals voting against the UFCW merger agreement which was the subject of the second June 8th notice. A constitution for a national union called Retail, Wholesale and Department Store Union/Canada ("RWDSU/Canada") was placed before the delegates and reviewed page by page. It was patterned on the International constitution and any changes were highlighted. Then a motion was made and seconded to adopt the constitution. A roll call vote was conducted in the same manner as the day before, and the vote was unanimously in favour of adopting the new constitution. The voting was chaired by the President of the Ontario Federation of Labour, as the locals wanted a neutral observer. When the vote results were announced, there was considerable emotion, and delegates stood and applauded for five minutes.

43. The new constitution included a provision that all members of a local union were members of the national union. In addition, all of the disaffiliating local unions became local unions of the new union. A motion was then made and seconded that the constitution be ratified by the members of the national union. Again, a roll call vote was taken, and the results were unanimously in favour.

44. The constitution also provided for a transitional National Executive Board, and to the effect that the Board and the National Officers would have all the powers conferred by the constitution during their terms. Motions were passed in this regard. A slate of officers was put to the meeting, and again, the vote was unanimously in favour. The officers then took the pledge called for in the constitution. There were twelve officers elected, representing all provinces. The composition was basically the same as the Canadian District Council Steering Committee and the elected Canadian Vice-Presidents.

45. The constitutional convention then concluded and the special meeting to consider merging the new national union with USWA was convened. A draft merger agreement was distributed to delegates and reviewed line by line in its entirety. It had been previously distributed to delegates from eastern and western Canada and to local unions in Ontario. There was some discussion, and minor changes were made. Then there was a break as some of the delegates wanted to caucus.

When the meeting resumed, a motion was made to adopt and approve the USWA merger agreement. Again, the President of the Ontario Federation of Labour chaired the voting, which was also a roll call vote, and the result was unanimously in favour of the merger. Pandemonium then ensued, with delegates cheering and singing "Solidarity Forever".

46. At that point, Leo Gerard, Canadian Director of the USWA was presented with a letter indicating that the RWDSU/Canada had approved the merger agreement. Mr. Gerard then provided a letter from Lynn Williams, the International President of USWA, indicating that the USWA had approved the merger agreement as well. Both sides signed the agreement and the meeting concluded after Mr. Gerard had addressed it.

47. On July 12, the International placed five of the southern Ontario locals into trusteeship, including Local 414. The reasons cited were that the locals disaffiliated without the approval of the International Executive Board and then merged with the USWA, and the utilization of funds, assets and property in this regard. On that same day, a number of officers and staff resigned, including Mr. Collins and Mr. Waters. Subsequently, the International redirected the mail and the telephone number of the Mississauga office to a new location and made several directions with respect to funds, which led to the banks freezing the bank accounts. In addition, letters were sent to a number of employers in collective bargaining relationships with the locals placed under trusteeship, redirecting the dues. Some of those employers responded by cancelling negotiating and grievance meetings and placing the dues in escrow until the dispute was resolved. Mr. McArthur was appointed as Mr. Dickinson's official agent for the five locals in trusteeship. He then purported to cancel the leaves of absence granted by employers for five members of Local 414, including the President, two members of the Local Executive Board and two stewards, and appointed a number of other people to represent the locals.

48. Finally, the parties agreed that at the UFCW convention during the week of July 26, 1993, the UFCW merger agreement was approved by the UFCW. It is in these circumstances that the applicant requests a declaration that it has acquired the rights, privileges and duties of Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414 under section 63 of the Act.

II. DECISION

49. Section 63 provides as follows:

63.- (1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

50. The Board's approach to this section has changed over the years. Initially, it took the view that a successorship declaration would not be made unless it could be shown that a majority

of the union members had signified their approval of the merger, amalgamation or transfer of jurisdiction (*Hydro-Electric Commission of the City of Hamilton* (1963), 63 CLLC ¶16,261). Following the court case of *Astgen v. Smith*, [1970] 1 O.R. 129 (C.A.), the Board's approach was to grant declarations where either constitutional provisions for merger, amalgamation or transfer of jurisdiction had been complied with, or there had been unanimous approval by the members. (See, for example, *Trans Nations Inc.*, [1981] OLRB Rep. Sept. 1298.) This was based largely on the theory of *Astgen v. Smith*, a case which involved an action to declare a merger a nullity. There, the court likened a trade union to a club or voluntary association where members were bound together by a complex of individual contracts represented by the constitution. A merger involved the extinction of those contractual rights, the court said, and thus there was no inherent power in a voluntary association to merge. Where there was no provision in the constitution for merger, the court concluded that there must be the unanimous consent of members to effect such a change in its fundamental objects.

51. Although the Board relied heavily on the *Astgen v. Smith* decision for a period of time, it is evident that the issue of whether a declaration of successor rights would be forthcoming under section 63 has always been treated differently than the manner in which a court might consider whether a merger had been effected at common law. For one thing, the Board has discretion under section 63 as to whether to issue a declaration, as the word "may" and the option to order a representation vote indicate. This explains in part why the Board has not required strict compliance with constitutional provisions, and has in fact issued declarations where there has been substantial compliance with the spirit of those provisions, and substantial completion of the merger, amalgamation or transfer.

52. There is also some suggestion in the jurisprudence that even strict compliance with the constitution may not result in a declaration if there has been no opportunity for the membership to express their wishes (*L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252 or that there may be other criteria to satisfy (*Children's Aid Society of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 24). In other words, the Board has considered strict compliance with the constitution neither a necessary, or perhaps even a sufficient condition for a declaration, although there appears to be some divergence of opinion in regard to the latter. In any event, the Board never followed *Astgen v. Smith* to the letter, as it issued declarations for example, where constitutions had been amended by less than unanimous consent to provide for mergers, which was not consistent with the court's reasoning.

53. In the last decade, it is fair to say that the Board has moved further away from the *Astgen v. Smith* approach, emphasizing the significant difference between the common law property rights addressed by the courts, and the scheme of the *Labour Relations Act* in providing for bargaining rights and the successorship of those rights. In *Waterloo Spinning Mills, supra*, the Board noted the distinctions between the club model of a union at common law, and the statutory position of a union under the Act:

At common law (i.e., before the passage of modern labour legislation some forty years ago), a trade union was merely a voluntary association of employees, like a club, acting collectively in pursuit of their common interests and without any statutory framework or underpinnings. Indeed, for a time, trade unions and their activities attracted common law sanctions because such collective action amounted to a civil conspiracy in restraint of trade. However, to determine whether one trade union has acquired the statutory rights and obligations of another - that is, to determine the application of section 62 [now section 63] of the Act - one cannot ignore the statutory framework or forget that unions no longer operate (as they once did) in a legislative vacuum. Trade unions, like clubs, may well be able to exist without direct reference to the *Labour Relations Act*, but the fact is that if a trade union is to do what by statute it must do to preserve its status as a union under the Act, it must conform to statutory norms.

A modern trade union is very different from a typical club. It is concerned primarily with the acquisition and exercise of statutory bargaining rights. What club or mere voluntary association has the exclusive statutory right to determine its members' terms and conditions of employment - regardless of what those members might think from time to time? What voluntary association in pursuit of its constitutional objectives has the right to act on behalf of and fundamentally affect the rights of persons who are not its members and who may never have voluntarily subscribed to those objectives? What club has a statutory obligation to fairly represent non-members, where necessary, expending membership funds to do so? What club can compel the payment of membership fees from members and non-members alike? How realistic is it to treat a trade union as a "voluntary" association when the reality is that membership may be made a compulsory condition of employment? In the present case, membership in the Association has been made a condition of employment for a number of employees. The fact is that while at common law a trade union may still be only a voluntary association, under the *Labour Relations Act* it is much more than that, and when considering the acquisition, exercise of transfer of rights rooted in the statute, one cannot ignore either the practical or legal differences. Likewise, in trying to ascertain a union's essential objects (in an *Astgen v. Smith* sense) we think the statute provides a guideline - at least in the absence of explicit conditions in the union's own constitution.

* * *

This is not to say, of course, that the constitution of a trade union is irrelevant to the Board. It is obviously an important document and in particular cases or contexts, its terms may be decisive. But it does not have the central role which it plays at common law in resolving disputes among the members over the use or distribution of assets, eligibility for office, the conduct of elections, the pursuit of the organization's objectives, and so on.

54. In *Melnor Manufacturing*, [1989] OLRB Rep. April 360, the Board was asked to declare inappropriate a decade of jurisprudence in which it had distanced itself from *Astgen v. Smith* and to require the unanimous consent of members where the constitution was silent on the issue of merger. In rejecting this proposition, the Board adopted *Waterloo Spinning Mills* in the course of emphasizing the difference between the court's approach at common law in *Astgen v. Smith* and the statutory rights addressed by section 63. Among other things, the Board noted that at the time the court made its decision in *Astgen v. Smith*, the Board had issued a successorship declaration between the unions involved, highlighting the different issues in these two distinct forums.

55. In other words, section 63 is part of a complex statutory scheme for collective bargaining in Ontario that reflects a marked departure from the common law view of unions as voluntary associations. While common law principles may be helpful in determining applications under section 63, they must be considered in a context which includes both the realities of modern labour relations and the specialized legal structure which regulates them.

56. With this approach in mind, it is useful to review what the Board has considered to be substantial compliance with the spirit of constitutional provisions in other cases. In *Zehrs Markets*, [1977] OLRB Rep. Oct. 637, a merger was challenged on the basis that the notice of a meeting indicated only that its purpose was to apply to merge with another union, and not that it was also to amend the constitution to provide for such a merger. In that case, the Board indicated that while the constitutional provisions regarding notice could not be treated lightly, the Board would not be unduly concerned with form if in substance the notice requirement had been met:

We are of the view that the provisions in a union constitution regarding the type of notice required to be given to members concerning a meeting where a proposed merger, amalgamation or transfer of jurisdiction is to be voted on cannot be treated lightly. On the other hand, however, we also are of the view that where in substance the notice requirements have been met and the members have in fact been provided with the information required by the constitution (or

otherwise required by law), the Board should not be unduly concerned with the form the notice might take.

57. Similarly, in *Children's Aid Society of Metropolitan Toronto, supra*, 14 days notice of a meeting for the purpose of merging with another union was required by the by-laws. The notice was delivered to each employee 8 days before the meeting. However, the Board found that since a newsletter sent to each member a month previously also contained notice of the meeting, this was sufficient to comply with the by-laws.

58. At that meeting, the members voted to merge. Following the meeting, the association involved received a number of calls from persons who had been caught in the "Mississauga disaster" and had not been able to attend the meeting. The Association therefore notified all employees that there would be another meeting where the vote would be continued. Only five days notice of this meeting was given, and there were no provisions in the by-laws for such extension meetings. The Board found that despite this, the notice given was reasonable notice, and therefore effective notice for the purposes of section 63.

59. In *Trans Nations Incorporated*, [1981] OLRB Rep. Sept. 1298 the Board dealt with a situation where two locals of the same international parent had merged. Neither of the locals had provisions in their constitutions for a merger, nor was there any attempt to amend their constitutions in this regard. The Board found that because the locals were affiliated with an International which had in its constitution provisions for merger, and because one of the local constitutions provided that a person who becomes a member of the local was also required to become a member of the International and abide by its constitution, this was sufficient. The Board also held that a posted notice of vote in some locations and verbal notice of a vote in others was enough and issued a declaration.

60. In an interesting turn of events, this more liberal approach was adopted by the courts in *Re McGhie and Canadian Air Line Flight Attendants' Association* (1986), 58 O.R. (2d) 332 where it was alleged that a merger failed to comply with a number of constitutional requirements including the fact that the notice did not identify the business to be conducted, certain resolutions were not placed before delegates, and the merger report was handed out 17 days in advance rather than the 8 weeks required. The court found that it had no jurisdiction in the matter for other reasons, but then went on to give its views on the merits for the benefit of the parties. It concluded that although there may have been some technical deficiencies, there had been substantial compliance with the spirit of the existing constitution provisions.

61. The Board addressed a situation in *I.B.L. Industries Limited*, [1987] OLRB Rep. Sept. 1144, where probationary employees had not been allowed to vote on a merger even though they applied for membership at the time they commenced employment, two employees were erroneously permitted to vote and seven employees did not get individual notices of the meeting at which the vote was held. The Board was satisfied that because probationary employees were not admitted to membership until the end of their probation, four of the seven employees who did not get individual notices attended at the meeting, notice was posted in the plant, and the votes of the employees involved would not have affected the outcome in any event, these defects were not fatal to the application. It cited the fact that "[t]he Board and the courts have explicitly recognized in the context of trade union mergers that the law will relieve against mere technical deficiencies where there has been substantial compliance with the spirit of constitutional provisions".

62. In the same vein, the Board indicated in *Waterloo Spinning Mills, supra*, that the starting point under section 63 should be the objects of the union and how it has actually operated. It found that the fact that employees from other workplaces were allowed to vote when they were not

entitled to membership under the constitution, the fact that there was no provision in the constitution for a merger, and the fact that only one vote was conducted for both the constitutional amendment and the merger were not obstacles to the issuance of a declaration. To hold otherwise, the Board said, would be to take an entirely too technical view which would be inconsistent with the way the Association had conducted business in the past. The Board also noted that even where there were limits in the constitution, they do not necessarily govern the acquisition of statutory rights.

63. In summary then, it is fair to say that the Board's approach to constitutional compliance under section 63 has been flexible, focussing on reasonable notice and common sense in a labour relations context. The effect is that in this forum, what might be considered significant technical defects in common law terms have not precluded successorship declarations in a number of cases.

64. This approach is further highlighted by the cases where the Board has also said that only substantial completion of the transaction is required. In the *Corporation of the City of Brockville*, [1979] OLRB Rep. Feb. 76 for example, an application was made for a declaration that one local of CUPE was the successor to another. The merger had not yet been completed in the sense that there were still separate executives and separate bank accounts, the locals had kept their business affairs separate and still voted separately on their own business, although they held their meetings together. In addition, the merger was challenged on the basis that it had not been established that that the merger procedures were approved under seal as required by the CUPE constitution.

65. The Board held that its concern when administering what is now section 63 is that both the predecessor trade union and the successor have given clear approval to the proposed transaction, as well as the employees. According to the Board "[o]nce these matters of substance have been established, then a declaration may issue under section 54 even though certain mechanics of the transaction still remain to be done". The Board found in this case that what was left undone was of a mechanical nature, and that for all intents and purposes the merger was completed. Even though the approvals in this case appeared to be conditional upon a declaration from the Board, that had been satisfied with the filing of the application. The Board went on to say that "to delay making a declaration until these mechanics were completed would introduce an element of unnecessary formality into the exercise of its jurisdiction under section 54 [now section 63]", and a declaration was issued.

66. Similarly in *Peerless Plastics Limited*, [1978] OLRB Rep. Sept. 848 the Board held that three days was reasonable notice of merger meeting in the circumstances, and that there had been substantial completion of the merger even though there had been no transfer of assets to the successor. The same approach was reflected in *Coca-Cola Ltd.*, [1987] OLRB Rep. May 658 where the Board rejected an argument that the application was fatally flawed or premature because it was in the name of the successor local, which had not been formally approved (along with the revised constitution and by-laws) until some six months after the date the application was filed with the Board.

67. The case of *J.S.H. Mueller Ltd.*, [1988] OLRB Rep. May 491 underscores the Board's practical emphasis in considering whether a transaction has been completed. There the Board addressed a situation in which an international union had merged two locals, over the opposition of one. The latter challenged the merger on the basis that the alleged successor local's by-laws limited its jurisdiction to a geographic area which did not include the area of the predecessor. Although the by-laws had been amended to expand that jurisdiction, it was necessary for the international president to approve the amendment, failing which it was null and void. It appeared that such approval had not been given, although the president expressed no doubt about his intention to do

so. The Board found that since the president had every intention to extend the successor's jurisdiction, whether or not he actually signed a document approving it was not significant:

In the view we take of these issues, the jurisdiction of Local 586 was extended to cover the County of Renfrew prior to the effective date of the merger or amalgamation. It was argued by counsel for Local 594 and for the intervener that Local 586 had not produced satisfactory evidence of this amendment. In our view, it is abundantly clear from the documentary evidence before us that the International President had every intention to extend Local 586's jurisdiction in anticipation of this merger or amalgamation. We cannot, in these circumstances, attach any particular importance to whether he actually signed a document approving the amendment of the Bylaws. The Constitution permitted the amendment and the political will to amend was obviously present. It would be unduly formalistic for this Board to question the amendment of the Bylaws on the basis of the absence of evidence as to the affixing of the International President's signature.

The Board's decision was affirmed by the Divisional Court on December 4, 1990, [now reported at [1990] OLRB Rep. Dec. 1365].

68. This, then, is part of the jurisprudential backdrop against which the facts of this case must be assessed. The issues raised by the parties can be roughly divided into five clusters: the location of the bargaining rights before these events, the disaffiliation of Local 414, the formation of RWDSU/Canada, the merger with USWA and the International's request for a representation vote.

A. The Prior Bargaining Rights

69. One of the first issues raised by the International in the matter relates to the location of the bargaining rights before these events. The International asserts that it held the bargaining rights for employees in this bargaining unit prior to July 10th and 11th rather than Local 414, or alternatively that both held the rights, and as a result, these events should not result in a successorship declaration. The applicant takes the position that Local 414 held the bargaining rights, and that it was now the successor to those rights. Among other things, both parties referred us to the collective agreement for this bargaining unit and the International's constitution in this regard.

70. The first page of the collective agreement describes the union party as follows:

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION

Locals 414, 429 (Timmins), 545 (North Bay), 579 (Sudbury), 582 (Sault Ste. Marie), and 915 (New Liskeard) AFL-CIO-CLC

The signing page of the agreement is set out as follows:

FOR THE UNION

RETAIL, WHOLE AND DEPARTMENT

STORE UNION, LOCAL 414

(list of names)

FOR THE UNION

RETAIL, WHOLESALE AND DEPARTMENT

STORE UNION, LOCALS 429, 545,

579, 582 and 915

(list of names)

The names include the names of local officials, bargaining committee members, and staff representatives who are employed by the International. However, the staff representatives who signed are also attached to the locals listed in some other capacity, either as members or local officials. A number of Letters of Understanding attached to the collective agreement are addressed to "R.W.D.S.U., Local 414" and "R.W.D.S.U., Locals 429, 545, 579, 582 and 915". They are signed by the company and the union parties are described on the signing page as:

"Local 414 (name)"

"Locals 429, 545, 579, 582 and 915 (name)"

71. Among other things, the International points to the fact that on the first page, there is a gap between "RETAIL, WHOLESALE AND DEPARTMENT STORE UNION" and the names of the locals in support of its view that the International holds bargaining rights. Counsel also notes that the letters "AFL-CIO-CLC" appear after the local numbers, although the locals cannot be affiliated with those organizations on their own. The applicant on the other hand cites the fact that the union name and the local numbers run together on the signing page, and says that the affiliation initials appear simply because that is the name of the union, used when describing the locals as well. Counsel points to the letters of understanding as indicating clearly that the bargaining relationship is with the local.

72. The parties referred us to the following provisions in the International constitution:

Section 9.(a) All members of a local union are members of the Retail, Wholesale and Department Store Union and are subject to the orders, rulings and decisions of the International Union and its properly constituted officers.

(b) Subject to the provisions of Article XVIII, *the local union to which the member belongs is irrevocably designated, authorized and empowered by him exclusively to represent him for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or any terms or conditions of employment, and for the negotiations, execution, revision and termination of contracts with employers covering all such matters.*

(c) *The local union to which the member belongs is irrevocably designated, authorized and empowered by him exclusively to appear and act for him and in his behalf before any board, court, committee or other tribunal in any manner affecting his status as an employee or as a member of his local union and exclusively to act as his agent to represent or bind him in the presentation, prosecution, adjustment or settlement of all grievances, complaints, disputes or any kind of character arising out of the employer and employee relationship as fully and to all intents and purposes as he might or could do if personally present.*

(d) The power given to the local union under clauses (b) and (c) hereof may with the consent of the local union be exercised by the International Union or its designee.

(emphasis added)

Article XVII includes the following provisions:

Section 2. *The right to bargain collectively for the whole membership of a local union shall lie with the Executive Board of the local union or officers designated by it and with the International Union or its Representative when the local union so requests.*

Section 3. The International Executive Board shall guide and advise the course of negotiations by the local unions.

Local 414's by-laws also provide as follows:

Section 2 - The unit shall concern itself with matters pertaining to the negotiation of a Collective Agreement under the supervision of the International union and in accordance with the policies devised by policy committees.

Section 3 - After a Collective Agreement has been negotiated, the unit is responsible for the processing of grievances in accordance with the Collective Agreement. *The unit is responsible for the Local for its actions, and the Local is the governing body in the province.*

(emphasis added)

73. Bargaining itself is conducted by Local 414's bargaining committee, assisted by a staff representative employed by the International. There were also several notices to bargain entered as exhibits which are equivocal in their wording. In addition, the applicant led evidence that certification applications were usually made in the name of the International, but that subsequently the new bargaining unit would be assigned to the appropriate local to represent members in collective bargaining. However, Local 414 itself includes the historical remnants of other locals, and the origins of the large, multi-store bargaining unit in question here are unclear.

74. The lack of clarity with respect to the original acquisition of bargaining rights, together with the Board's jurisprudence indicating that a collective agreement supersedes a certificate in this regard focusses attention on the current collective agreement. Unfortunately, that agreement is somewhat ambiguous. I do not think it can be said that it supports the International's contention that the bargaining rights were at least shared between the International and the Local, even if that were possible in the face of sections 42 and 50. This is not a case, for example, where the collective agreement reads "X Union *and* its Local Y" as some agreements do. (It was not suggested that the bargaining rights were shared among the locals listed in the agreement as there was apparently no dispute that they had different geographic jurisdictions.) Neither do I find the International's argument that it "owned" the bargaining rights while Local 414 administered them to be tenable in terms of the overall scheme of the Act. On the other hand, the collective agreement provisions are not particularly clear.

75. In these circumstances, the other evidence adduced by the parties is of some assistance in interpreting the collective agreement. The constitutional provisions set out above make it quite clear that Local 414 is irrevocably and exclusively designated to represent members for the purposes of collective bargaining, grievances, and all disputes of any kind arising out of the employer and employee relationship. When this is combined with the other sections providing that the right to bargain collectively for the membership of a local union lies with the executive board of the local union, the fact that the International may play a role in advising or guiding negotiations appears insignificant. Indeed, the constitution indicates that the International may only exercise the power

to represent members for collective bargaining purposes when the local union either requests or consents to it. (There was no evidence that Local 414 had either requested or consented that the International play such a role.) These provisions are also consistent with the evidence that new bargaining units are assigned to locals for representation, and the other evidence with respect to how bargaining is conducted.

76. Reviewing the collective agreement in this context, on balance I conclude that at the time of the commencement of these events, Local 414 held the bargaining rights for this unit.

B. The Disaffiliation of Local 414

77. Proceeding chronologically through this sequence of events, the International suggests that the disaffiliation of Local 414 was flawed because the UFCW merger agreement was not put to a special convention in accordance with Local 414's by-laws. In fact, it is not obvious that the special convention provision relating to a merger or a "similar move" applies to disaffiliation as well, nor that the inclusion of the disaffiliation provisions in the merger agreement somehow triggers this article. However, assuming for the purposes of this decision that it does apply, it appears from a reading of those by-laws as a whole that the reason a special convention is required is simply because the regular conventions are fixed, that is, held biannually in the months of April, May or June. The intent is that there be a convention, and normally it would be a special convention because a regular convention would not necessarily be scheduled at the appropriate time. In this case, however, consideration of the UFCW merger coincided with the Local's regular convention, and the UFCW merger agreement was discussed at that convention. In my view, this more than satisfies the requirements of the by-laws, since there is no requirement that such a merger be discussed or voted upon.

78. Moreover, the correspondence makes it clear that the International was aware of this provision in Local 414's by-laws, and knew that no special convention had been held. Nevertheless, it accepted Local 414's delegates at the UFCW merger vote meeting, seated them and allowed them to vote. Under the circumstances, there is considerable merit to the applicant's argument that the International has waived its right to object on this basis. I also observe that notices of this application were posted in the workplaces of this bargaining unit and no employee came forward to intervene in these proceedings.

79. The International also argues that the disaffiliation of the Local was not complete at the time it joined the other locals to form the RWDSU/Canada. As a result, it takes the position that the latter could not be a successor, nor the applicant a subsequent successor to that. Article XVII of the international constitution provides that an affiliate cannot disaffiliate without the approval of the International Executive Board. The UFCW merger agreement sets out the following:

E. The RWDSU International Executive Board by voting to approve this Merger Agreement, has approved, in accordance with Article XVII of the RWDSU Constitution, the disaffiliation of those Canadian affiliates who have voted to seek disaffiliation as described in Paragraph 16(D)(1), above, on the following basis:

(1) The disaffiliation shall be effective October 1, 1993.

There are then a number of other sub-paragraphs which describe various consequences of the disaffiliation and requirements with respect to certain kinds of indemnities, and so forth. Paragraph 16(D)(1) provides that Canadian affiliates who vote against the UFCW merger agreement are deemed to have sought disaffiliation.

80. At the outset, it is worth noting that paragraph 16(E) is not a constitutional provision.

In fact, it is a term of an agreement between the International and UFCW to which Local 414 is not even a party. Among other things, this also means there can be no suggestion that the members of Local 414 have agreed to it, either figuratively or literally. In addition, it does not call for the dissolution or extinction of a disaffiliating local. There is nothing in the agreement or facts of this case which suggest that even on October 1st, Local 414 itself would have gone out of existence. On the contrary, the merger agreement makes it clear, for example, that the Local retains all its properties, funds and assets upon disaffiliation. All that happens is that the Local is no longer affiliated with International. In other words, even the rationale for constitutional compliance, which includes the agreement of members to the constitution and a fundamental change in objects does not apply in these circumstances.

81. Of course, the international constitution does require the approval of the International Executive Board for disaffiliation. However, paragraph 16(E)(1) of the merger agreement is not particularly clear in terms of its application. I do not think that the words “on the following basis” can be read as meaning that the approval is *conditional* upon the date of October 1st occurring. For one thing, this would be incongruous with respect to some of the other sub-paragraphs these words precede. For another, the provision makes it clear on its face that by voting to approve the merger agreement, the International Executive Board “*has approved*, in accordance with Article XVII of the RWDSU Constitution, the disaffiliation”. The International Executive Board voted to approve the UFCW merger agreement on April 7th, 1993 which was then signed April 8. In other words, the necessary approval for the subsequent disaffiliations was given on that date. Although this provision is not especially well-drafted, the most sensible interpretation is that the arrival of October 1st is not a condition precedent of the approval, but a detail or aspect of the approval. The approval had already occurred, fulfilling the requirements of the International constitution; at its highest it could only be argued that the disaffiliation itself was not complete in some way until October 1st.

82. What then, is the implication of this provision in the context of the Board’s jurisprudence on substantial completion? One thing is quite clear about paragraph 16 (E)(1) which stipulates October 1, 1993; it is entirely automatic. All that must happen is for this date to arrive. It appears from the evidence that Ms. Miller’s view was that the time period between the UFCW merger vote meeting and October 1st constituted a sort of cooling off period in which the Canadian locals could change their minds. However, this is flatly inconsistent with the merger agreement provisions, which provide for certain consequences as a result of an unfavourable vote. There is no option for a change of heart on the part of the disaffiliating locals; the subsequent vote option is for the locals voting in favour of the merger agreement only. Indeed, the merger itself is not effective until October 1, but there was no suggestion that the American locals voting in favour of it could change their minds during this interregnum.

83. Moreover, the merger agreement also makes it evident there is no magic about the date of October 1st. A subsequent paragraph provides that Canadian locals which vote for the merger agreement may change their minds later and vote to disaffiliate, and “such disaffiliation will be consummated in accord with the provisions of Paragraph 16(E) above”. Since this can happen at any time within a four-year period, it can hardly be said that the date of October 1 plays a significant role in completing the disaffiliation of the locals.

84. Some of the other sub-paragraphs require a disaffiliating local to provide certain indemnities and tenders. Mr. Collins testified that Local 414 stands ready and willing to provide those items. In these circumstances, I conclude that what was left to occur in terms of the disaffiliation was purely mechanical. The substance of the provision was that if a local voted against the merger agreement, it would be deemed to have sought disaffiliation. As of April 7th, the approval

required for that disaffiliation in the constitution had already been given in advance. The rest was paperwork, and it is certainly possible to conclude that the October 1st date was inserted simply to provide some time to allow that paperwork to be completed, and to be consistent with the UFCW merger date. In other words, this situation falls well within the Board's jurisprudence with respect to substantial completion. I note in passing that *Canadian Rexall Corporation*, [1976] OLRB Rep. Sept. 557 does not apply here as the trusteeships were not imposed on the locals (as opposed to the Canadian District Council) until after July 11th.

85. Because the merger agreement stipulates that the laws of the state of New York shall be deemed to govern the interpretation and performance of the agreement, both the International and the applicant filed affidavits from American lawyers purporting to address the disaffiliation from the point of view of New York law. As it turns out, these affidavits were not of much assistance. For one thing, they are diametrically opposed in their conclusions. In addition, the deponents appear to rely in part on assumptions which were not in evidence before me. Lastly, to the extent they focus on interpreting the language of the merger agreement, these affidavits do not suggest principles of construction (as opposed to conclusions) which are at odds with the interpretative approach forming one aspect of my conclusions on this issue.

86. In light of the substantial compliance with Local 414's by-laws, the triggering of the approval which met the requirements of the international constitution, and the substantial completion of the disaffiliation itself, Local 414 became disaffiliated after the vote on July 10, 1993. As a result, the international constitution did not apply to the events of July 11th, and the local was free to take such steps as it desired without the approval of the International.

87. I have addressed this argument on the basis of the International's position that the bargaining rights should not ultimately flow to the applicant if the disaffiliation had not been effected. However, it is also worth remembering at this point that the bargaining rights were held by Local 414 prior to the July 10 vote. This puts the disaffiliation problem into perspective. It is not as if Local 414 had to rely on the approval of the International or the disaffiliation provisions of the merger agreement to acquire those bargaining rights. Indeed, the *Coca-Cola* case makes it clear that it is not necessary in these circumstances for the Board to make a declaration that the disaffiliated Local 414 was a successor to Local 414 of the RWDSU (and in fact, it may not be possible if disaffiliation is not covered by section 63). In that case, the Board indicated that such a declaration would be essentially redundant because the local held the bargaining rights before disaffiliation, and simply continued to hold them after disaffiliation. I find this accurately characterizes the facts in this case as well.

C. The Formation of RWDSU/Canada

88. The next issue involves the events of July 11th. The International challenges the formation of the RWDSU/Canada on a number of grounds. Firstly, counsel argues that the creation of this organization was either a merger or a "similar move" to a merger, and thus the by-laws of Local 414 required that a special convention be called.

89. It is not entirely clear that the by-laws of Local 414 survived the disaffiliation. However, assuming that they did, the Board defined the terms set out in section 63 in *Hydro-Electric Commission of Ontario* (1957), 57 CLLC ¶18,080. In that case, it said that a merger means the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist. An amalgamation involves the union of different societies so as to form a new body, and a transfer of jurisdiction involves the assignment of control over a subordinate branch by one parent union to another parent union. (The definition of transfer has been amplified since then to encompass other situations as well, for example, in *M.L.S. Cable Installations Inc.*, [1987] OLRB Rep. Nov. 1413).

90. Not surprisingly in the circumstances, the constitution adopted by the delegates on July 11th stresses the autonomy and continuing intact nature of the locals involved. For example, Article XXVIII, sections 1 and 2 provide as follows:

Each local union and other affiliate of the Retail, Wholesale and Department Store Union AFL-CIO-CLC which has disaffiliated from that union by virtue of the vote held on July 10, 1993, shall become local unions and affiliates of Retail, Wholesale and Department Store Union/Canada upon the effective date of this constitution. Such local unions and other affiliates shall retain their charters as of the date of its original issue and become by virtue of this Constitution, a chartered body of the Retail, Wholesale and Department Store Union/Canada.

Except as otherwise provided in this constitution, *nothing shall effect, interrupt or change in any way the status and autonomy or the rights or duties of local unions* and other affiliates or their officers. Such local of affiliate officers shall continue to hold office until such time as their terms expire in accordance with local and/or affiliate by-laws.

(emphasis added)

91. In this case, the locals were not losing their property, their executives, their assets, or their respective identities. There is little doubt that Local 414 was not absorbed into the new national union in the sense described in *Hydro-Electric Commission of Ontario, supra*. Rather, it took on a different form when the disaffiliated Local 414 became Local 414 of the RWDSU/Canada. On the other hand, it is clear from the substantive nature of the new constitution, its provisions making all local members also members of the national organization, and both the form and substance of the events of July 11th that what occurred was more than a mere affiliation. Having regard to the evidence and to the definitions set out in the Board's jurisprudence, it is more accurate to characterize the creation of the RWDSU/Canada as the union of the locals involved so as to form a new body - in other words, an amalgamation.

92. Is an amalgamation a "similar move" to a merger so as to trigger the requirement in Local 414's by-laws for special convention? At first glance, such a proposition has some merit, especially since the terms are sometimes used interchangeably. On the other hand, general principles of statutory interpretation suggest that the three kinds of transactions set out in section 63 should not be construed as superfluous. This tends to reinforce the differences between these types of events. It also seems quite possible in common sense terms that Local 414's by-laws intended that there be a special convention when the local was contemplating a move which would lead to its extinction, but not necessarily otherwise.

93. The applicant also argued that the RWDSU/Canada constitution provided that the local unions had to amend their by-laws so that they conform to the constitution. Under this provision, until such time as they are amended, the National Executive Board had the final authority to interpret the by-laws. The RWDSU/Canada constitution provides only that merger requires the approval of the National Executive Board and does not require a special convention, so that in these circumstances, counsel argued, the National Executive Board had the final authority to interpret the by-laws in such a way that a special convention was not required. Counsel for the International suggests this provision would only operate if the by-laws were inconsistent with the RWDSU Constitution, and points to a reference in the article to another article which reads "shall conform to and not conflict". It is true that Article XXVIII itself which grants the National Executive Board this power speaks only of conforming to the constitution, rather than conflicting. However, the problem with this argument is that it is rather circular to look to the new constitution for authority overriding the by-laws with respect to the meeting which created the new constitution. Of course, some circularity seems to be endemic to these situations, as the Board's jurisprudence with respect to the formation of new trade unions reflects. Nevertheless, I do not find this argument particularly persuasive.

94. What is more important is that the special convention provision of Local 414's by-laws is not a particularly substantive one. It reads as follows in its entirety:

A special Convention shall be called by the Executive Board of the Local if a merger, or similar move is considered by the International or the Local.

All that is required is that a special convention be called. There is no actual provision for discussion of the merger, nor is there a requirement for any kind of vote or approval. On the other hand, the requirement of a convention itself seems to suggest some opportunity for discussion or a canvas of views.

95. In this case, delegates elected by a Local 414 convention eight weeks previously and authorized by Local 414 by-laws to represent the Local at conventions cast the votes of Local 414 members with respect to the amalgamation. The evidence indicates that the UFCW merger, the disaffiliation and the USWA merger had been discussed at meetings with Mr. Collins at considerable length. In addition, it is not suggested by the applicant that bargaining rights were ceded to the new national organization in and of itself. Rather, the evidence supports the conclusion that bargaining rights were retained by Local 414, which was now Local 414 of the RWDSU/Canada.

96. These specific circumstances and the fact that I am approaching the matter from the point of view of the succession of bargaining rights provides a context for interpreting the meaning of a "similar move". Having regard to that context and the two possible interpretations of this phrase available, on balance I am not inclined to construe this phrase as including an amalgamation. Alternatively, if an amalgamation is a similar move to a merger, these circumstances in the overall context of this case lead me to the conclusion that the failure to call a special convention should not by itself cause me to exercise my discretion against a successor declaration.

97. The International also argues that the delegates were not authorized to vote to create the new national organization. The applicant contends that if the delegates were good enough to vote on the UFCW merger or disaffiliation on behalf of Local 414, they were good enough to vote for affiliation as well, and there is some merit to this perspective. More significantly, however, these delegates were not elected just to vote on the UFCW merger. They were elected at the Local 414 convention in May as members of the Local Executive Board, who were empowered by the by-laws to attend conventions on behalf of the Local. This practice of standing delegates was recognized by the International constitution and in the notice of the July 10th UFCW merger vote meeting. There were no specific restrictions placed on their authority at the time of their election, and it can hardly be said that voting on the UFCW merger or disaffiliation is of less gravity than voting for affiliation with RWDSU Canada. As a result, this argument is unpersuasive as well.

98. Since the Canadian District Council meeting of July 11th was aborted by the imposition of the trusteeship, I do not find it necessary to address the International's arguments with respect to the requirements in the Canadian District Council by-laws.

99. The International is also of the view that the events of the constitutional convention on July 11th did not create a new organization with trade union status, and thus Local 414 of RWDSU/Canada should not be considered a successor to Local 414 of the RWDSU. In fact, as noted, since the bargaining rights were not ceded to this national organization in and of itself, the issue raised by the intervenor is less significant. It was not suggested that Local 414 of the RWDSU was not a trade union (whether or not it had been so declared by the Board) and there was nothing in the disaffiliation or amalgamation which would have caused the kind of fundamental change in its objects or identity which would mean it was no longer a trade union. (See for example, *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517, *Food Corp. Limited*, [1983] OLRB

Rep. May 636, *Coca-Cola Ltd.*, [1975] OLRB Rep Nov. 862.) Indeed, the Board's jurisprudence is clear that a local can be a trade union, and there is ample evidence before me in terms of the structure and operations of Local 414 to find that it was a trade union at the commencement of these events.

100. In any event, the evidence makes it clear that the steps taken on July 11th to form the RWDSU/Canada were more than sufficient to create a trade union in the context of the Board's jurisprudence in this area. Its general approach is set out in *Opera Ghost Productions Inc.*, [1990] OLRB Rep. March 325:

Although the requirement that a trade union be an "organization" implies that it must have some structure, and the nature of the rights, obligations and duties that a trade union has under the *Labour Relations Act* suggests that there are certain characteristics that it must have, the only pre-conditions to trade union status under the Act are that at least two employees have agreed to be bound by the terms of an identifiable agreement between them (i.e., a constitution), which section 84 of the Act seems to contemplate will be in writing, for purposes which include the regulations of relations between employers and employees. This is nothing in either the *Labour Relations Act* or otherwise which dictates how an organization must be formed, structure or operated in order to be a trade union within the meaning of the *Labour Relations Act*. There is therefore no one formula which must be followed in order to successfully create an organization which is a trade union within the meaning of the Act. Whether a trade union has come into or continues to exist is a question of fact to be determined have regard to the circumstances of each case (see, for example, *Ontario Hydro*, [1989] OLRB Rep. Feb. 185; *L'Abbe Construction (Ontario) Ltd.*, [1987] OLRB Rep. Oct. 1191; *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517).

101. Within this general approach, however, the Board has also set out some guidelines which are often referred to as the five step test. In *Service Employees International Union*, [1991] OLRB Rep. Feb. 267, the Board summarized those steps in a quote from its own guide:

"A Guide To The Labour Relations Act" is a booklet prepared and made available to the public by the Board. In the section titled "The Legal Requirements for Establishing a Trade Union" and in response to the question "what must a group of employees do to form an organization that will be recognized as a trade union?" the Guide offers, *inter alia*, the following:

... The current procedure is as follows: the employees proposing to form a trade union hold a meeting; a written constitution is prepared; the employee group votes to approve the constitution; then the employees involved become members; and, finally, the members vote to ratify the constitution. They then elect officers of the union to administer its business and represent it.

102. At the same time, the Board has also said it will not be unduly technical in this regard (see *Service Employees International*, *supra*; *VME Equipment of Canada Ltd.*, [1986] OLRB Rep. Oct. 1480; *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797; and *Canteen of Canada Limited*, [1978] OLRB Rep. Sept. 802).

103. The evidence in this case indicates that the delegates held a meeting, voted to approve a written constitution prepared in advance which had as one of its terms that all members of the locals would become members of the new organization, and then voted to ratify the constitution. They then voted on officers.

104. Does the fact that this was done by delegates mean that the resulting organization was not a trade union? Leaving aside for the moment the issue of membership, there seems to be no reason why this should be so. It is useful to keep in mind that most of the Board's cases in this area involve small associations where it is natural that employees themselves will be the actors. In this case, however, the disaffiliating locals had a membership of some 20,000, and a sophisticated delegate structure. To suggest that they could not create a new trade union unless all 20,000 assembled

in one meeting and went through the five steps themselves does not make much sense in practical labour relations terms. Moreover, as the Board noted in *Opera Ghost*, above, the issue of trade union status is not dependent on one formula, but on the circumstances of each case. Indeed, the Board has not even required the five step test to be followed in cases involving established organizations with histories of functioning as trade unions.

105. With respect to the issue of admitting employees to membership, there is some suggestion in *The Dufferin-Peel Roman Catholic Separate School Board*, [1976] OLRB Rep. Dec. 821 that a union security type clause in a constitution requiring membership could not fulfil the membership step for the creation of a trade union because membership is an individual commitment. That case can be distinguished on its facts: for example, the constitutional provision here is much stronger than in that case, and provides that persons who are already members of a local union are members of the national union as well. In addition, the delegates in this case actually cast the votes of the members through the roll call vote approving this provision as part of the the constitution. (There are provisions as well for applying for membership in the national, but it is evident from Section 9 that local members do not need to make such applications to be members in the national.) The *Dufferin-Peel* case also relies heavily on an *Astgen v. Smith* conceptual approach which the Board has found less useful in the last decade.

106. However, it is not necessary for me to decide whether section 9 of the national constitution functioned to admit all members of the locals to the national union for the purposes of the five step test. As the Board observed in *Opera Ghost, supra*, for trade union status (as opposed to the issue of the succession of bargaining rights), it is only necessary that at least two employees have agreed to be bound by a written constitution which has as one of its objects the regulation of relations between employers and employees. In this case, most of the delegates were rank and file members of the locals, and by approving this provision, at the very least they committed themselves to membership in the national. (I have disregarded what was alleged by the applicant to be confirmation of membership by the delegates attached to the constitution as it was not proven in evidence before me.)

107. It was also the International's view that RWDSU/Canada was not established to regulate labour relations, a requisite object for trade union status for a new organization. This was because its only purpose, according to counsel, was to create a vehicle for merger. However the national constitution contains a declaration of objectives and principles which includes the advancement of the economic and social welfare of workers, the establishment of certain kinds of working conditions, collective bargaining and so forth. Normally this would fully satisfy the Board's requirements. The fact that the new organization was actually only in existence for a short period of time does not detract from those objects. There was at least a possibility that delegates could have voted against the USWA merger agreement, with the effect that the new national union would have continued to function. As a result, assuming that the five step test is applicable here, I find that its requirements have been fulfilled, and the RWDSU/Canada was a viable organization of employees formed for purposes that include labour relations - that is, a trade union.

108. The issue of whether the new union should be considered a successor if in fact this sequence of events was not sufficient to make all members of Local 414 members of the national is addressed to some extent below in the discussion of the International's request for a representation vote. However, at this point, it is useful to note again that it is Local 414, as a local of the new organization which is alleged to be the successor to Local 414 of the RWDSU, and that the scheme of the *Labour Relations Act* contemplates the representation of even non-member employees by a bargaining agent.

109. The International further argued that delegates did not have sufficient time to study either the new constitution or the USWA merger agreement. The evidence indicates that the new constitution was basically patterned on the international constitution and that any changes were highlighted at the meeting. In addition, both documents were reviewed in great detail at the meetings, and delegates broke and caucused to discuss the merger agreement. It was also clear that a significant number of delegates did receive copies of the USWA merger agreement in advance, and that the locals had been discussing what should be in a merger agreement for some time previously as a result of their concerns about the terms of the UFCW merger agreement. There is no evidence that any of the delegates objected or indicated that they required more time to study these documents, and my attention was not drawn to any provision for advance distribution in Local 414's by-laws, the International or the national constitution. As a result, the International views in this regard are unconvincing.

110. Another objection by the International relates to the notice of the constitutional convention and meeting. Counsel alleges that the notice was insufficient because the agenda did not set out clearly enough the business that was to transpire. The notice read as follows:

There will be a Constitutional Convention and meeting of the above Locals and their delegates immediately following the C.D.C. meeting in Toronto at the Delta Hotel, 801 Dixon Road on July 11, 1993 to decide the future and successor organization to R.W.D.S.U. locals in Canada deemed "to be disaffiliated. This should start around 11:00 a.m. and adjourned around 6:00 p.m.

The agenda will include:

- 1) Discussion of the future organization and options.
- 2) Adoption of a new name, constitution and officers if applicable.
- 3) Adoption of a merger proposal if applicable.

Please ensure that your delegates are representative of your Local and should be the same delegates as to the UFCW/RWDSU merger meeting. It is important that together we forge a new future for our members.

Having regard to the Board's jurisprudence in this area, the notice seems entirely adequate to alert locals to the issues which would be discussed and decided upon.

111. The International also takes the position that the July 11th meeting events were invalid because notice of the meeting was given one month in advance, rather than the 90 days required under Local 414's by-laws for a convention call. However, it is evident that this requirement only applies to Local 414 conventions, which is set out in the by-laws as a very specific kind of event. The first meeting on July 11 was a constitutional convention of all the disaffiliating locals, not an internal Local 414 convention. The national constitution adopted requires 60 days notice for a convention, but of course, this was only effective after the constitution was adopted. In other words, for the constitutional convention on July 11 there was a vacuum in terms of notice requirements. There is some suggestion in the Board's jurisprudence that in these circumstances, the Board should proceed to decide whether there was reasonable notice. Assuming that it is necessary for me to do so, and having regard to the Board's jurisprudence where as little as three days has been considered adequate notice, I find that a month's notice was reasonable.

112. Counsel for the International was of the view, however, that the local delegates were not entitled to vote because of various stipulations in the national constitution, for example, that they had to be in continuous good standing in the local and the national for at least twelve months.

Again, these requirements only came into existence after the adoption of the new constitution, and as a result do not amount to an impediment affecting the validity of the constitutional convention on July 11th as a whole. At best it might affect the motions with respect to officers. Having regard to the fact that compliance would have been impossible for some of these stipulations, I am not prepared to find that this nullified the motions with respect to the new organization's officers. Alternatively, if it did, or if they affected the convention generally, I find that this alone would not lead me to a conclusion that the national organization was not a trade union since the five steps were completed in substance. Nor do I find that this affected the validity of subsequent events or the authority of the delegates to vote on either the constitution or merger. Given my conclusion that the delegates were authorized to vote in substance, it would be unduly technical and not in keeping with the Board's jurisprudence to find that such provisions militated against a successor declaration.

113. Having regard to all the evidence, I conclude that Retail, Wholesale and Department Store Union/Canada, Local 414 was a successor to the Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414.

D. The Merger with USWA

114. I now turn to the meeting of July 11th which followed the constitutional convention, to which the new national constitution did undoubtedly apply. The requirement with respect to notice and the stipulations with respect to delegates voting are contained in a section of the national constitution in regard to conventions. However, mergers are dealt with under another article, which provides as follows:

The National shall have the power to merge, affiliate or amalgamate with any other trade union organization should such merger, affiliation or amalgamation be approved by a majority of delegates in attendance at a meeting or convention called for such a purpose. Such meeting of July 11, 1993 is deemed to be such a meeting.

115. It is not obvious that the requirements under Article IV apply to Article II, and in fact, the last sentence of Article II suggests otherwise. Since the delegates did in fact have reasonable notice of the issues discussed at that meeting through the June 8th notice as well, there is no reason to find the business transacted there invalid as a result of these arguments.

116. The International further argues that the Local 414 by-law referred to above with respect to the requirement of a special convention for a merger applies to the meeting which followed the constitutional convention on July 11. There is no doubt that what occurred at that second meeting was a merger. However, this provision only applies to consideration of a merger by the Local or the International. In case of the second July 11th meeting, it was the national union that was purporting to merge, not the Local or the International. For this reason, and for the reasons set out above with respect to the special convention provision and the amalgamation, I do not find this an impediment to a successor declaration.

117. I therefore conclude that the merger with USWA was completed in substantial compliance with the requirements of the national constitution, and that any variance with Local 414's by-laws should not be determinative.

E. Representation Vote

118. If I find that this sequence of events would otherwise give rise to a declaration of successor status in the applicant, the International argues that I should order a representation vote. (Actually, the International's position was that *only* if the Board was inclined to issue such a decla-

ration should a representation vote be held; otherwise, the application should be dismissed). The essence of the International's position in this regard is that the process was simply not democratic enough because there had been no vote of all employees in the bargaining unit.

119. According to George Adams in *Canadian Labour Law*, (2nd ed., Aurora, Ontario: Canada Law Book, 1993), labour boards have been reluctant to order representation votes in union successorship applications. In this connection, the author cites the Ontario cases of *Jaeger Machine Co. of Canada Ltd.*, [1983] OLRB Rep. July 1082 and *Lambton Health Unit*, [1975] OLRB Rep. July 543. This proposition also appears to be borne out by the numerous cases submitted to me by the parties where it is evident that the ordering of a representation vote under section 63 is a relatively rare event. Similarly, Jeffrey Sack and Michael Mitchell in *Ontario Labour Relations Board Law and Practice* (Toronto: Butterworths, 1985) state that "[i]n the absence of any evidence that the employees were misled or deceived by merger proceedings the Board has refused to order a vote", citing *Lambton Health Unit*, *supra*, again for this proposition.

120. In *Lambton Health Unit*, *supra*, the Board said in rejecting a request for a representation vote:

In short, the Board does not hold that there is any basis to conclude, especially in the absence of any intervention in these proceedings by the employees affected, that they were misled or deceived by the merger proceedings. Counsel's request that a representation vote [be held] is therefore denied.

121. The Board decided not to order a representation vote in *Jaeger Machine*, *supra*, because there was no evidence of widespread misunderstanding among the membership, and no interference with the expression of the members' true wishes regarding the merger. Among other things, the Board said that its approach was to look upon mergers by trade unions essentially as an internal procedure, that members are the best judges of what should be necessary to effect a merger with another union and that the Board was unwilling in that case to second-guess the judgement of the members.

122. Similarly in *The Peel County Board of Education*, [1973] OLRB Rep. Dec. 623, the Board rejected the idea of a representation vote because employees had received reasonable notice and there was no suggestion that any employees objected, nor did any appear at the hearing.

123. In *Jaeger Machine*, *supra*, an employee vote had already been held as part of the merger process. The facts are less clear in *The Peel County Board of Education* and *Lambton Health Unit* cases, although it appears there was at least a meeting of some kind in the former and notice to employees in the latter. However, in *J.S.H. Mueller Ltd.*, *supra*, the Board clearly addressed a case where one local was merged with another by an International union without any kind of vote, and over the objection of the predecessor local. In that case, the Board said as follows:

We disagree with the arguments put to us to the effect that the Constitution impliedly requires the approval of Local 594's members and Local 586's members before a merger or amalgamation of the locals can be effected under article 15, section 5. We are aware of no principle of interpretation that would require, or even permit, us to imply a need for membership approval of a merger or amalgamation, when the Constitution clearly empowers the International President to decide on mergers or amalgamations of locals.

124. On judicial review the Divisional Court upheld the Board's decision, and said that ordering vote in the circumstances would have been an unwarranted interference in the internal workings of the union:

The Board having satisfied itself that the International Brotherhood had acted within its constitution when it merged Local 594 into Local 586 so the Local 594 no longer existed, had in our view the discretion to make a successor declaration under section 62(1) of the *Labour Relations Act*, without taking any vote or otherwise satisfying itself that the former members of Local 594 supported either the merger or that a successor declaration be made.

Indeed in the circumstance here present the ordering of a vote would have been tantamount to an unwarranted interference in the internal workings of the International Brotherhood and would have left as the bargaining agent for the Renfrew electricians a local that the International Brotherhood had already decided no longer existed.

The court also found that the failure to order a vote was not an infringement of the Charter of Rights, nor did it amount to a denial of the right to belong to the union of one's choice.

125. A somewhat different view is expressed in *L.M.L. Foods, supra*, where the Board observed that the wishes of affected employees were always a relevant concern. However, the Board also noted that democratic structure in unions is not a requirement of the *Labour Relations Act*, that the Act's primary focus is not on the internal structure and inter-relationships of its members and that with certain limited exceptions, the Act does not provide for supervision of the relationship between a trade union and its members.

126. In this case, Local 414's by-laws did not require any kind of vote on the disaffiliation, or the following amalgamation and merger. Nevertheless, each of these steps was accompanied by votes. The international and the national constitution required only a delegate vote with respect to mergers. In other words, the various bodies at relevant times in this saga have done either what was required by their constitutional instruments to test the wishes of members, or more. In addition, Mr. Collins canvassed the opinions of local officers and members with respect to these events at considerable length. In these circumstances, does the fact that these were delegate votes suggest that the Board should decline to issue a declaration but should order another a vote, this time of members?

127. It is noteworthy that the Board has accepted other delegate votes without comment (for example, in *Coca-Cola, supra*, and *Formula Plastics Inc.*, [1987] OLRB Rep. May 702). Even in *L.M.L. Foods*, it was not suggested that the wishes of the members could not be reflected in a delegate vote. Provisions for the election of delegates and their voting process are contained in the international constitution, Local 414's by-laws and the national constitution. For the Board to ignore those provisions which are detailed and sophisticated, and disregard the well-established and long-standing tradition within the locals with respect to delegate representation strikes me as something of an unusual encroachment into their affairs. Moreover, it implies holding unions to a standard of democracy far in excess of that required in Canadian society generally. The delegate structure here was no more undemocratic than any representative democracy. In fact, the ratio of delegates to members in this case compares favourably to that generally found in municipal, provincial or national government in Canada. While democracy is always an evocative concept, it does not necessarily imply a plebiscite, let alone a plebiscite of the 20,000 members of the disaffiliating locals. Among other things, the Board is cognizant of the fact that unions are not organizations of unlimited resources. I also observe that there was no suggestion that the delegate process was something new, in conflict with the practice until now or designed to promote a certain outcome with respect to the various votes involved.

128. Finally, a consideration of the possible choices in a representation vote highlights the problematic nature of a vote direction. Counsel for the International advised the Board that at least one of the choices in such a vote should be Local 414 of the RWDSU. However, that entity no longer exists in that form. In fact, the International will also cease to exist in its present form on

October 1st, becoming a district council and a “constituent part” of the UFCW according to the merger agreement. Ordering a vote of some 5,000 members in the bargaining unit before us and providing choices which are likely to obsolete even before a vote of this size could take place does not seem particularly sound in terms of labour relations.

129. Of course, one potential choice on the ballot could be the RWDSU District Council of the UFCW which is what the International is slated to become on October 1st. However, I note that neither the International nor the UFCW held the bargaining rights for these employees at any material time in this case. Ordering a vote with respect to the RWDSU District Council of the UFCW in this situation would in some respects have the effect of a mid-term raid. It is also true that the International and the UFCW set up the terms of the delegate vote on the UFCW merger through the merger agreement. Those terms were clearly designed to maximize the chances of a favourable vote and to make rejection of the merger as unattractive as possible. When despite this the locals voted against the merger, it seems inequitable to allow the International to now say that the delegate structure was not democratic enough, and to ask for another vote which would in essence be on the UFCW merger.

130. Indeed, one possible implication of the International’s position is that the American RWDSU/UFCW merger vote was also defective. I would be reluctant to take a step which suggests a cloud on the merger of organizations with 105,000 members and 1.2 million members respectively without more compelling reasons.

131. Another option would be a vote between Local 414 of the RWDSU/Canada and the applicant. However, again, the former organization no longer exists, having become a division of the USWA, and in any event, no party requested such a vote. The last possibility, that of a vote simply on whether the applicant should represent employees in this bargaining unit, is also unsatisfactory. It leaves open the possibility of what amounts to a mid-term decertification, a result requested by no party and one which is incongruous with the purpose of section 63 in providing stability for the bargaining rights in successorship situations.

132. In fact, this possibility highlights the fact that there are extensive representation provisions in the *Labour Relations Act* setting out a scheme for bargaining agent representation which is quite separate and distinct from the successorship provisions. While the issue of representation intersects to some degree with section 63, it is worth noting that there are also different issues involved. If every merger triggered a representation vote, there would be little need for section 63. Moreover, the representation provisions in the Act provide something of a safeguard for successorships under section 63. Employees always have the option of applying at the appropriate time for a declaration terminating the successor union’s bargaining rights or replacing it with another union. It is in this context that the International’s request for a representation vote must be evaluated.

133. Ultimately I find that it is not necessary for me to resolve any degree of divergence between *J.S.H. Mueller, supra*, and *L.M.L. Foods, supra*, as I conclude that the delegate votes in this case provided a meaningful opportunity for the wishes of members to be expressed. In these circumstances and having regard to both the overall structure of the Act and the Board’s jurisprudence, the International’s request is rejected. In light of the evidence before me, I find the applicant to be the successor to Retail, Wholesale and Department Store Union/Canada, Local 414 which I have previously found to be the successor to Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, and I declare that the applicant has acquired the rights, privileges and duties of its predecessors.

134. Lastly, it became apparent during the case that a decision with respect to the successor rights issue might be of some assistance to the parties in resolving the unfair labour practice allega-

tions. In the circumstances, a settlement of the section 91 complaint would be preferable in terms of the labour relations climate between the various unions involved. As a result, although I have heard all the evidence with respect to this complaint, I have not recited some of it in this regard, and I am adjourning the complaint *sine die* to give the parties a further opportunity for settlement. If they are unable to resolve the matter, any party may request a decision on the section 91 complaint by writing to the Board. I remain seized of both matters.

2610-92-R Practical Nurses Federation of Ontario, Applicant v. Wingham and District Hospital, Responding Party

Bargaining Unit - Certification - Board reviewing and considering *Mississauga Hospital, South Muskoka Memorial Hospital and Strathroy-Middlesex General Hospital* cases - Board finding union's proposed bargaining unit, comprised solely of those employed as registered or graduate nursing assistants, appropriate - Certificate issuing

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members W. N. Fraser and H. Kobryn.

APPEARANCES: Douglas J. Wray, Cathy Skim, Phyllis Barfoot and Otalene Shaw for the applicant; Allan Shakes, Lloyd Koch and Gordon Baxter for the responding party.

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER H. KOBRYN: September 22, 1993

1. This is an application for certification in which the applicant seeks a bargaining unit composed solely of Registered and Graduate Nursing Assistants (an RNA only unit) as follows:

all employees employed as registered or graduate nursing assistants by the Wingham and District Hospital in the Town of Wingham, save and except Nursing Co-ordinators and persons above the rank of Nursing Co-ordinator.

For the recent history of the applicant union's organizing of RNA's, and the context in which the parties argued this case, see *The Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380, *South Muskoka Memorial Hospital*, [1992] OLRB Rep. April 520 and *Strathroy-Middlesex General Hospital*, [1992] OLRB Rep. Oct. 1103, referred to below as *Mississauga Hospital*, *South Muskoka* and *Strathroy-Middlesex*. A similar application in *Englehart & District Hospital*, Board File 1140-92-R, was heard during the same week as this case.

2. At the outset of the hearing, the Board canvassed the list of employees with the parties. The parties agreed that Karen Ann Coultres and Martin Cretier should be off the list of employees agreed to be in the bargaining unit sought by the applicant.

Facts

3. The parties proceeded by stipulating facts, which were not in dispute in any significant respect, rather than calling oral evidence.

4. There are 68 beds in the hospital, 25 chronic and 43 active. The hospital has a total of

approximately 247 employees. There are about 50 RNA's, approximately 14 full-time and 34 part-time.

5. A Director of Patient Care is in charge of the Nursing and Pharmacy departments of the hospital. There are seven nursing units in the hospital: obstetrics, medical/surgical, intensive care, paediatrics, geriatrics, the emergency room and the operating room (the OR). RNA's work in all these units. Each unit has a co-ordinator, an RN who leads a team composed of RN's and RNA's. There are 55 RN's employed by the hospital.

6. There are two people on the agreed list, one full-time and one part-time, whose classification is O.R. Tech (RNA). This classification is considered part of the nursing department and its agreed inclusion on the list of employees for this application indicates agreement that the incumbents are employed as RNA's. RNA qualifications are required for the position and incumbents also work as RNA's in the emergency room.

7. There is no one without the RNA qualification employed as an RNA in this hospital. RNA's have moved from RNA jobs to jobs that do not require RNA qualifications. In this category, in the last 18 years, one RNA moved to each of physiotherapy aide, laboratory aide, ward clerk and portering. The last of these occurred over four years ago. As well, a fifth moved in February, 1991 to the Central Supply Room (CSR) and does relief work as an ORT (agreed to be in the bargaining unit proposed by the applicant). Other than this relief work, none of the RNA's who have left RNA work have moved back into the RNA unit.

8. The hospital cites the above movement and other aspects of its use of RNA qualified employees as examples of problems with job mobility it sees with the bargaining unit proposed by the applicant, and filed various job descriptions to illustrate its point. The ORT who moved to work in the CSR, considered part of the nursing department, has among his job functions the responsibility to assist in the operating, recovery and emergency rooms in emergency situations. The previous person in the CSR job came from housekeeping and was not an RNA. In February, 1991, when the position was filled by the former ORT(RNA) cited above, the job description was redone to have utilization of that position in other areas and provide expertise in CSR. As qualifications for the position, the hospital now prefers an RNA with ORT experience. The current incumbent is on call for O.R. a significant amount of time and worked close to 40 hours in O.R. in 1992. The ORT's also do relief in the CSR (as do RN's if someone is absent and they are familiar with the work).

9. There are other jobs, such as physiotherapy aide, with a patient care component such as moving people with casts where preference is given to candidates with RNA qualifications so well. This is because of the knowledge of body mechanics and observation skills that RNA's have. However, physiotherapy aides are not on the list of employees agreed to be in the unit proposed by the applicant. Preference is also given to candidates with RNA qualifications for lab aide jobs which have some functions analogous to patient care, venipuncture, for example.

10. The only full-time ward clerk is an RNA. The qualification is helpful since it involves knowledge of medical terminology and the nursing documentation system. The ward clerk does part of the auditing and quality assurance of the nursing record system and surveys patient records. Since the ward clerk job is a Monday to Friday job, rather than involving shift work, it is attractive to some RNA's who need or want a change from shift work.

11. The cardiology technologist does blood collection much like the lab aide. Although the hospital looks for experience and education in electrocardiography rather than RNA qualifications, the current incumbent has RNA qualifications.

12. Nursing orderlies also perform some patient care functions, although there are many duties that can only be performed by certified people such as RN's and RNA's, for example, charting. As qualification for the orderly position, the hospital looks for a recognized course for orderlies (not an RNA course). The number of orderlies has been reduced in the hospital over time and they are now used primarily in chronic care areas for the care of male patients. The union says that orderly jobs are posted and no RNA who has recently applied for an orderly job has received one. The hospital says that there have been RNA's employed as orderlies in the past.

13. RNA's work as orderlies when the Hospital is short-staffed, which is on a fairly consistent basis. There were 20 shifts between October and December, 1992 when RNA's replaced orderlies for complete shifts. There were also times when RNA's helped out for less than a complete shift. RNA's continue to be paid as RNA's when they are doing relief work as orderlies. RNA's and orderlies currently receive the same wages, pending implementation of a pay equity plan. The union believes there are at least 600 RNA shifts per month. In its view, this makes the number of shifts worked as orderlies rather small in comparison.

14. The hospital's housekeeping department employs a porter who transports patients around the Hospital. RNA qualifications are not required for this position, but an RNA transferred into it in 1988, because it is a Monday to Friday job. When she transferred, the current incumbent made it clear she wanted to come back to the nursing department if the portering job was phased out.

15. The Hospital's proposed alternative bargaining units are a service or a paramedical unit. As to the clarity note for the standard paramedical unit, the employer observes that the parties might have to discuss exactly which positions were in and out. For example, the ECG technicians have been included in a service employee bargaining unit in some hospitals, while in the paramedical in others. Another borderline classification is lab aides. A service group including the RNA's would be 127, of which 48 would be RNA's. The paramedical unit would be 18 and the office and clerical would be 17. Addressing the respondent's proposed paramedical or service unit for the RNA's, the union says that employees in the other relevant classifications work in different areas, perform different functions under different supervision and have different shifts and wages.

16. In terms of employee organizations, the Hospital was non-union until December, 1992, when the Ontario Nurses Association (ONA) was certified as bargaining agent for a unit of RN's. No other union had attempted to organize the RNA's or service workers before this application.

17. There has been an RNA committee comprised of RNA's employed by the Hospital for approximately 30 years. Its executive is elected by the RNA's. The committee meets on a monthly basis internally as specific problems arise. The Hospital provides facilities and allows people to attend meetings, sometimes on paid work time. The chair of the committee meets with the Director of Patient Care if necessary. The Hospital has access to the minutes of the meetings which are left in a binder in the nursing office. One of the things the RNA committee does is select RNA's to sit on various committees like the Occupational Health and Safety and Personnel Policy Committee. The Hospital underlines that the RNA committee is not a Hospital committee and it has the right to accept or reject nominations from the RNA's. There was no indication that the right to reject had ever been exercised.

18. The Hospital does not consider its dealings with the RNA committee as evidence that it recognizes RNA's as a separate group; it describes the committee's activities as meetings of a special interest group. The Director of Patient Care might be invited to attend if the committee was looking at new procedures for example, but there is no management attendance unless invited. The hospital makes the point that the committee is not structured around the shape of the bargain-

ing unit that the union is proposing, referring to the fact that two RNA qualified people who are not employed as RNA's attend those meetings. Apparently there are also a number of other RNA qualified people who are not working as RNA's who do not attend RNA committee meetings. The union also points out that last year, when the Director of Patient Care spoke to the RNA committee about added nursing skills, a porter with RNA background was asked to leave because she was not an RNA, in light of the topic.

19. The RNA's have participated as a group in responding to the proposed hospital-wide pay equity plan by way of a complaint to the Pay Equity Commission through their committee. A review officer was sent to the Hospital to meet with the Hospital and RNA's. Since they were a non-union group, the Commission provided legal counsel to the RNA group. Preparation of a job facts sheet was co-ordinated and approved by the RNA's through the RNA committee for the purposes of that complaint. The pay equity plan had not yet been implemented or finalized at the time of hearing as it had not received Hospital approval. Consequently, no money had been paid out under it. However, a pay equity settlement was dealt with by a specially convened RNA only meeting. RNA's voted amongst themselves in the hospital board room to accept it.

20. There is an RNA school attached to the hospital, which has been associated with it for 50 years. Many of the employees of the hospital were students at that school. The RNA's as a group offer a bursary for students at that school, an indication of the major interest in the school among employees of the hospital.

21. RNA salaries and benefits have been implemented in this hospital in line with the centrally bargained service bargaining unit settlement which includes RNA's in most of the hospitals participating in central bargaining. The Hospital stressed the inter-relationship between the RNA's and other positions in the Hospitals.

22. As to the relevant facts not specific to this hospital, both parties referred to the findings of fact in the cases cited above, which need not be repeated here, although we have considered them. As well, the hospital made reference to the fact that there are only 16 out of 220 hospitals in the province which do not have a collective agreement with a service employees unit.

The Parties' Submissions

23. Both parties adopted the submissions made in support of their respective positions in the earlier jurisprudence cited and that portion of their arguments will not be set out in detail here although we have carefully considered those submissions.

24. The union argued that an RNA unit should generally be considered *an* appropriate unit, absent some peculiar facts which make it not so. They argue that the particular facts at Wingham and District Hospital are closer to those in *Mississauga Hospital* and *South Muskoka* than to *Strathroy-Middlesex* all cited above at paragraph 1 of this decision.

25. The union argued on the particular facts at this hospital, community of interest for RNA's was strongest among the RNA's themselves. The next strongest would be with the RN's, but a nursing department bargaining unit is no longer available since the RN's were recently certified for an RN-only bargaining unit. The union maintains that any other configuration strains the concept of community of interest beyond the breaking point.

26. In considering the hospital's proposed alternatives, the union refers to the hospital's organizational chart. Counsel observes that the traditional service unit would include employees from a variety of the hospital's departments, and not include all of any. The union views the par-

amedical unit as equally “irrational” since the RNA’s fall under the aegis of the Director of Patient Care, while others in the paramedical unit would be under the Director of Rehabilitation, while still others would be under the Director of Radiology or Laboratory. The union argues that the organizational chart demonstrates its point that community of interest is strongest in the group it proposes and the alternatives would be “stretching it”.

27. On the question of fragmentation, the union made the same argument set out in *Mississauga Hospital* para. 22, cited above, to the effect that the concerns underlying the issue of fragmentation are lessened considerably because of a number of factors peculiar to hospitals and employees with professional certification. Compulsory interest arbitration rather than strikes or lock-outs means there is no risk of work stoppage as a result of bargaining in this industry. The need for certification to perform RNA work means there will be no significant interchange between the RNA classification and other hospital jobs. The potential for jurisdictional disputes, it is submitted, is primarily with RN’s and exists throughout the industry. The alternative bargaining units would not change this fact. As to the extra cost of bargaining with an added unit, the union does not see that as sufficient reason to deny the requested unit.

28. Union counsel refers to the fact that the hospital is largely unorganized and argues that the numbers of employees in any of the other proposed units mean it is unlikely the RNA’s would be able to be represented by the union of their choice in the alternative configurations. Counsel observes that in 85 years there has been little appetite for collective bargaining. The RNA’s now want to be organized; it is submitted that this should not be contingent on the wishes of employees who have not shown any appetite for collective bargaining.

29. In general, the union argues that there are far more similarities than differences between the case before us and *South Muskoka*. Union counsel argues that the size of the hospitals is about the same. Like *South Muskoka* ONA now represents the RN’s. The RNA’s there were also dealt with separately for pay equity purposes.

30. Counsel argues that the facts that distinguish *Strathroy-Middlesex* from *Mississauga Hospital* and *South Muskoka* do not exist at Wingham and District Hospital. Referring to four distinguishing facts, counsel says:

a) RNA qualified people are not included in the unit unless they are employed as RNA’s. Counsel argues that that alone is enough to suggest that the Board should reach a conclusion different from that in *Strathroy-Middlesex*.

b) In *Strathroy-Middlesex* the Board expressed concern about uncertainty about who was in and out of the bargaining unit. Counsel states that there is no uncertainty here. The parties had no difficulty deciding who falls within the applicant’s proposed unit. Counsel says the situation is the opposite of *Strathroy-Middlesex*. the respondent has already acknowledged that there may be uncertainty with its proposed alternative service and paramedical units.

c) The Board in *Strathroy-Middlesex* also expressed concern about people moving in and out of the proposed unit. No one has moved into the RNA unit from elsewhere in the hospital, and there are legal barriers to that because registration is required by law to perform RNA work. Of 200 employees only a handful were RNA’s and moved to different jobs. This makes it extremely rare for an RNA to move out of the requested unit.

As to occasional moves, such as the Central Supply Technician being on call for the Operating Room, and RNA's filling in for absent orderlies, the union argues that this should be of no significance for the determination of the appropriateness of the bargaining unit. In their submission the conclusion that it is done with such regularity as to constitute a serious labour relations problem is not open to the Board on the facts of this case. The union submits that this is a matter for bargaining and that it will not be the party to make this a problem; the union wants its people to be able to pick up extra hours elsewhere if they want to.

d) On the matter of the existence of an employee association, the union argues these facts are closer to *Mississauga Hospital* and *South Muskoka* because of the RNA only committee. The union observes that the employer had not set up the structure in either *Mississauga Hospital* or *South Muskoka*. The important thing in the union's submission is that the RNA's have a structure, they raise their concerns and the hospital has recognized them to the extent of giving them facilities and letting them go to meetings. What recognition an employer gives a group before an application for certification should not be determinative in any event, in the union's submission. If an employer does not give voluntary recognition, a group has to come to the Board for certification. The union argues that it would be an absurdity if an employer could defeat an application for certification by saying they had not recognized a group earlier.

31. In summation, the union argues that these facts are not substantially different from *Mississauga Hospital* and *South Muskoka*, and therefore a similar result should obtain. The union maintains the RNA's are numerically viable and the employer has not demonstrated any convincing serious labour relations problem. Whatever other units might be appropriate, the union argues its proposed one is among them.

32. The hospital, by contrast, argues that these facts are like those at *Strathroy-Middlesex* and that decision should be followed.

33. The employer argues that *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459 appropriately stopped the proliferation of hospital bargaining units, and that the structure it set up cut across the normal hospital organizational chart in much the same way as its proposed alternative units would. Reporting lines are not a factor which stands out in the earlier Board jurisprudence. The hospital argues that taking RNA's out of a service unit devastates the traditional service worker unit. Where as here there are obvious community of interest lines with classifications which would fall into the service or paramedical units, like physio-aide and nursing orderly, the unit with a narrower community of interest should not be considered appropriate by the Board. The employer argues that it should not be criticized for acknowledging the uncertainty in the parameters of the paramedical unit. It is said that the service unit usually organizes first and then the paramedical unit, if it is organized, is more like a tag-end unit.

34. Because of the number of positions that require or prefer RNA qualifications in this hospital, the employer argues that mobility of employees within the hospital favours a unit other than the RNA-only unit. The hospital argues that the 4 permanent moves out of the RNA unit should be seen in terms of 4 out of the 48 RNA's in the unit, not 4 out of all the employees in the hospital. The employer observes that seniority rights would be an obstacle to continued mobility in the hospital, because it knows of no collective agreement where someone outside the bargaining

unit has as many rights as someone within it to post into bargaining unit positions. As to RNA's moving in and out of the bargaining unit, the hospital observes that the CSR technician is working in the bargaining unit proposed when he works relief as OR Technician. Although this union may not oppose job mobility, there is no guarantee a service unit will not be organized. Another union might feel differently.

35. The Hospital cited *Milton Hospital v. CUPE Local 815*, September 30, 1987, an arbitration award where a board of arbitration considered the Board's decision in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 in coming to the conclusion that the community of interest of a ward clerk was greater with RNA's than with office staff.

36. The employer refers to *The Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371 for the type of drawbacks it sees with the applicant's proposed unit: impeding mobility, increased potential for jurisdictional disputes, together with the time, trouble and expense of negotiating and administering several collective agreements. The employer underlines that the 1974 Johnston Commission's recommendations were that there should only be 3 standard bargaining units in the hospital sector: nursing, service and paramedical. As well, the hospital argues that the Bill 40 amendments provide a thrust toward consolidation of bargaining units, which should support the broader units.

37. The hospital argues that here the RNA committee was probably spawned by the interest generated in the RNA school associated with the hospital. This is not the same as *Mississauga Hospital*; it does not include the dynamics of negotiating about wages for instance.

38. The hospital maintains that allowing this unit will be an invitation for each group with a separate professional qualification to apply for a separate bargaining unit. This is seen as a large problem in the province in general as there are under 50 paramedical bargaining units out of a possible 220 hospitals. The hospital underlines that the new *Regulated Health Professions Act*, (Bill 43 c.18, S.O., 1991) which has received Royal Assent, but has not been proclaimed in effect as yet (with the exception of some transitional provisions) accentuates this problem, since a number of groups which were not self-regulating professions will become so under the new legislation.

39. The hospital reiterated the general arguments it made in *Strathroy-Middlesex* as to the disadvantages of the RNA only unit. On the subject of the potential for jurisdictional disputes, the hospital says that it is possible that RNA's would be upgraded to do medications and result in disputes with the RN unit. Since RNA's already replace orderlies, the hospital argues there could be conflicts with a service unit. In *Mississauga Hospital* the Board's reservations about an RNA-only unit were mitigated by the fact that the positions with some overlap of duties with RNA's would soon be deleted. Here there is a major continuing overlap in the hospital's view.

40. The employer points out that there is evidence here of similarity of skills between RNA's and service workers, something about which the Board in *Mississauga* remarked there was no evidence.

41. The hospital also made reference to *The Municipality of Metropolitan Toronto*, [1992] OLRB Rep. March 315, on the problems of fragmentation in an intermingling situation.

42. The hospital suggests that, if this application is dismissed, the RNA's could get another bargaining agent, or PNFO could organize allied personnel. The hospital notes that, in contrast to *Mississauga Hospital*, where the RNA's had opposed an application by the Steelworkers to represent a service unit which included RNA's, there is no such history here.

43. The union replies that none of the 48 RNA's have ever been anything but RNA's; 4 out of the hospital's 217 employees once were RNA's. The bargaining unit should not be denied because in 18 years 4 people moved out of it, submits counsel. Whether people who have not worked as RNA's for years should be able to come back is something that can be bargained about; it is not the type of serious labour relations consequence that should deny the unit in the union's view.

44. After 85 non-union years, what some other union will do is speculative, in the union's submission, and should not be relied on by the Board. As to the references to Bill 40 in the employer's argument, union counsel submitted that those amendments were not intended to make it more difficult to organize.

45. The union argues that if there are consequences for these RNA's choice of this bargaining agent, that should be their decision. It should not lie in the mouth of the employer to say they should be represented by someone bigger. The employer's points about central bargaining would apply even if the applicant organized every employee in the hospital, and thus should not be relied on in the union's submission.

[Paragraphs 46 to 73 omitted: Editor]

74. Thus, we have considered the various aspects considered to be serious labour relations problems by the employer in this case. We do not consider any of them to be more extensive than the ones considered by the Board in *Mississauga* and *South Muskoka*, where they were not found sufficiently serious to deny similar units. We do not find that there is the imprecision in the definition of the bargaining unit found in *Strathroy-Middlesex* or such frequent interchange with other classifications that the unit should be denied. In sum, we find the facts sufficiently close to those in *Mississauga* and *South Muskoka* that the unit applied for should be granted as we are not persuaded a different approach is warranted in this case.

75. Although the decisions in *Mississauga Hospital* and *South Muskoka* are fact-specific, the constellation of facts in those cases is not necessarily particularly unusual in the hospital sector, as evidenced by the facts of this case and those in *Englehart & District Hospital*. The tenor of the earlier decisions indicate that the Board was willing to consider new options - to take a new look at a bargaining unit historically considered inappropriate. To that extent the decisions represent, as we said earlier, a departure from the Board's usual rejection of department and classification based bargaining units. However, it is our view that the departure is based on extremely specific circumstances - limited to the situation of historical anomaly described in these cases - of difficulty of finding an appropriate fit for the RNA's in the traditional service unit in light of the evolution of their role in the hospital sector in the direction of the RN's and is not a rejection of the validity of the Board's usual approach. Given those particular circumstances, the consideration of section 3 rights (*Mississauga Hospital*, para. 48 and *South Muskoka* para. 16) tips the balance to allowing the RNA unit to be found to be an appropriate bargaining unit despite the potential problems set out by the employer in this case and in the previous cases.

76. For all the above reasons, we find the unit applied for to be the appropriate bargaining unit for the purposes of this application.

77. There are no other issues outstanding between the parties. The applicant has the required support of more than fifty-five per cent of the employees in the bargaining unit. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER W. N. FRASER; September 22, 1993

1. I disagree with the decision of the majority that an application for a unit of RNA's is appropriate. I am opposed to fragmentation of the bargaining relationship in the health care sector.
2. I would have dismissed the application.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2256-92-R: Ontario Nurses' Association (Applicant) v. Wingham and District Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the Wingham and District Hospital in the Town of Wingham, save and except Nursing Co-ordinator, persons above the rank of Nursing Co-ordinator, the Director of the Nursing Assistant School, persons regularly employed for not more than 24 hours per week and excluding as well Supervisors" (20 employees in unit)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the Wingham and District Hospital in the Town of Wingham regularly employed for not more than 24 hours per week, save and except Nursing Co-ordinator, persons above the rank of Nursing Co-ordinator, the Director of the Nursing Assistant School and excluding as well Supervisors" (38 employees in unit)

2569-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada) (Applicant) v. Chrysler Canada Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all office, clerical and engineering employees of Chrysler Canada Ltd. in Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the Plant Manager, secretary to the Manufacturing Engineer Manager, secretary to the Production Control Manager, secretary to the Product Engineering and Quality Control Manager, Management trainee, supplier quality assurance engineers, statistical process control engineers, plant environmental control administrator, manufacturing engineer control co-ordinator, network analysts, industrial engineers, stamping shift control co-ordinators, and all employees in the following departments: personnel, finance, factory information system, product engineering and quality control, distribution, manufacturing group accounting and plant engineering" (74 employees in unit)

0064-93-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Beta Decorating Ltd., Maler Painting (Respondent)

Unit: "all painters and painters' apprentices in the employ of Beta Decorating Ltd., Maler Painting, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Beta Decorating Ltd., Maler Painting, in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"

0408-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: "all employees of Grant Paving & Materials Limited in the Township of Best, save and except forepersons, persons above the rank of foreperson and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

0410-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: "all employees of Grant Paving & Materials Limited in the Township of Bucke and Coleman in the District of Temiskaming, save and except forepersons, persons above the rank of foreperson and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

0568-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tri-Mana Construction Limited (Respondent)

Unit: "all construction labourers in the employ of Tri-Mana Construction Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman," (3 employees in unit)

0715-93-R: International Union of Bricklayers and Allied Craftsmen Local 5 (Applicant) v. Boemer Anderson Construction Ltd. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices in the employ of Boemer Anderson Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices in the employ of Boemer Anderson Construction Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0844-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Cambridge Leaseholds Limited (Respondent)

Unit: "all Security Guards employed by Cambridge Leaseholds Limited in the City of Oshawa, save and except Security Chief and persons above the rank of Security Chief" (8 employees in unit) (*Having regard to the agreement of the parties*)

0931-93-R: Canadian Union of Public Employees (Applicant) v. Corporation of the County of Prince Edward (Respondent)

Unit: "all employees of the Corporation of the County of Prince Edward in the County of Prince Edward, save and except Deputy Clerk-Treasurer and persons above the rank of Deputy Clerk-Treasurer, H.J. McFarland Memorial Home Administrator, H.J. McFarland Memorial Home Director of Nursing, H.J. McFarland Memorial Home Administrative Assistant, H.J. McFarland Memorial Home Dietary Supervisor, H.J. McFarland Memorial Home Plant Co-ordinator, County Engineer, Planning Director, Social Services Administrator, Road Foreman, Museum Curator, Engineering Assistant, Recycling Co-ordinator, Administrative Assistant (County Administrator) and persons for whom any trade union held bargaining rights on the date of application, June 14, 1993" (15 employees in unit)

0980-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Intervener)

Unit: "all employees of Ontario Guard Services Inc. in the Region of Durham, save and except supervisors and persons above the rank of supervisor" (66 employees in unit) (*Having regard to the agreement of the parties*)

1007-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dart Machine Limited (Respondent)

Unit: “all employees of Dart Machine Limited in the Township of Sandwich South, save and except foremen and persons above the rank of foreman, office and sales staff” (44 employees in unit)

1110-93-R: The Ontario English Catholic Teachers’ Association (Applicant) v. Oxford County Roman Catholic Separate School Board (Respondent)

Unit: “all occasional teachers employed by the Oxford County Roman Catholic Separate School Board in the County of Oxford, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act” (59 employees in unit) (*Having regard to the agreement of the parties*)

1143-93-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Consoltex Inc. (Respondent)

Unit: “all purchasing and traffic department office employees of Consoltex Inc. in the Town of Alexandria, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

1212-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited in the City of Etobicoke, save and except Site Supervisors, persons above the rank of Site Supervisor, Guard Inspectors, office, clerical and sales staff, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of July 9, 1993” (19 employees in unit) (*Having regard to the agreement of the parties*)

1245-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. General Motors of Canada Limited (Respondent)

Unit #1: “all Plant Security Officers of General Motors of Canada Limited at its Windsor Trim Plant facility located at 1600 Lauzon Road in the City of Windsor, save and except Supervisors, persons above the rank of Supervisor, Safety Security Officer, Chief of Fire and Security and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all Supplemental Security Officers of General Motors of Canada Limited at its Windsor Trim Plant facility located at 1600 Lauzon Road in the City of Windsor, save and except Supervisors, persons above the rank of Supervisor, Safety Security Officer, Chief of Fire and Security and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

1251-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Limited in the City of Toronto, save and except Site Supervisors, persons above the rank of Site Supervisor, Guard Inspectors, office, clerical and sales staff, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of July 14, 1993” (136 employees in unit) (*Having regard to the agreement of the parties*)

1259-93-R: The Ontario Pipes Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicants) v. Thornton Steel Ltd. (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Thornton Steel Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Thornton Steel Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1261-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Chrysler Canada Ltd. (Respondent)

Unit: "all office and clerical employees of Chrysler Canada Ltd. in the City of Mississauga, save and except Supervisors, persons above the rank of Supervisor, Managers, Sales Development Specialists, Depot Operations Specialists, Occupational Health and Safety Administrator, Perpetual Inventory Count Administrator, Depot Parts Analyst, National Account Executive, Fleet/Lease Administration Co-ordinator, Secretary to the Regional Manager, Secretary to the National Parts Distribution Centre Manager, Secretary to the Fleet/Lease General Manager, sales and marketing management trainees and all employees in the Treasury Department" (19 employees in unit) (*Having regard to the agreement of the parties*)

1273-93-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. BLM Mining Services Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of BLM Mining Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of BLM Mining Services Inc. in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1285-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent)

Unit: "all Security Guards of Ontario Hydro employed at the Nuclear Generating Station in the Town of Pickering, save and except Supervisors and persons above the rank of Supervisor" (54 employees in unit) (*Having regard to the agreement of the parties*)

1355-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all employees of Group 4 C.P.S. Limited at 1 Eglinton Square in the City of Scarborough, save and except Operations Manager and persons above the rank of Operations Manager" (4 employees in unit) (*Having regard to the agreement of the parties*)

1357-93-R: Canadian Union of Public Employees (Applicant) v. Golfview Group Homes Ltd. (Respondent)

Unit: "all employees of Golfview Group Homes Ltd. in the City of Peterborough, save and except Director and persons above the rank of Director" (30 employees in unit) (*Having regard to the agreement of the parties*)

1358-93-R: International Union of Operating Engineers Local 796 (Applicant) v. Oshawa General Hospital (Respondent) v. Canadian Union of Public Employees and its Local 45 (Intervener)

Unit: "all stationary engineers and persons primarily engaged as their helpers in its powerhouse and persons employed as licenced refrigeration/HVAC mechanics at The Oshawa General Hospital in The City of Oshawa save and except assistant chief engineer, supervisors and persons above the ranks of assistant chief engineer and supervisor" (2 employees in unit)

1364-93-R: Ontario Public Service Employees Union (Applicant) v. Pioneer Youth Services (Toronto) Inc. (Respondent)

Unit: "all employees of Pioneer Youth Services (Toronto) Inc. in the Municipality of Metropolitan Toronto, save and except Assistant Supervisors and persons above the rank of Assistant Supervisor" (34 employees in unit) (*Having regard to the agreement of the parties*)

1365-93-R: Labourers' International Union of North America Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: "all employees of David Martin Enterprises (London) Limited employed at Westown Plaza Mall, 301 Oxford Street West in the City of London, save and except non-working supervisors, persons above the rank

of non-working supervisor, office, and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

1377-93-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Scott D. Avery (Company) Ltd. (Respondent)

Unit: "all security guards employed by Scott D. Avery (Company) Ltd. at the Sarnia Court House, 700 Christina Street, Sarnia, Ontario, save and except supervisors and persons above the rank of supervisor" (7 employees in unit)

1383-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 671 Warden Avenue in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1398-93-R: Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O., and C.L.C. (Applicant) v. The Corporation of the City of Thunder Bay (Respondent)

Unit: "all Support Service Worker employees of The Corporation of the City of Thunder Bay in the City of Thunder Bay, employed in the Homes for the Aged Department, save and except Supervisors and persons above the rank of Supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

1399-93-R: Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O., & C.L.C. (Applicant) v. Nipigon District Memorial Hospital (Respondent)

Unit: "all paramedical employees of Nipigon District Memorial Hospital in the Townships of Nipigon, Red Rock and Dorion, and the Villages of Lyon and Stirling, save and except supervisors and persons above the rank of supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1406-93-R: Ontario Public Service Employees Union (Applicant) v. Nu-Mark Food Services Limited (Respondent)

Unit: "all employees of Nu-Mark Food Services Limited at the Mimico Correction Complex in the Municipality of Metropolitan Toronto, save and except the Assistant Manager and persons above the rank of Assistant Manager" (10 employees in unit) (*Having regard to the agreement of the parties*)

1410-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 77 Maitland Place in the Municipality of Metropolitan Toronto, save and except patrol supervisors and persons above the rank of patrol supervisor" (6 employees in unit) (*Having regard to the agreement of the parties*)

1420-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Evans Investigation & Security Limited (Respondent)

Unit: "all Security Guards employed by Evans Investigation & Security Limited in the Province of Ontario, save and except Guard Supervisors, persons above the rank of Guard Supervisor and students employed during the school vacation period" (51 employees in unit) (*Having regard to the agreement of the parties*)

1426-93-R: United Steelworkers of America (Applicant) v. Gallup Canada, Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Gallup Canada, Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and sales staff" (63 employees in unit)

1433-93-R: International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Foley Coating Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Foley Coating Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Foley Coating Inc. in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson and the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1436-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at Imperial Oil, 10 Mississauga Road South in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1449-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Barnes Security Services Ltd. c.o.b. as Metropol Security (Respondent)

Unit: "all Security Guards employed by Barnes Security Services Ltd. c.o.b. as Metropol Security at Northern Telecom Canada in the City of Belleville, save and except Supervisors and persons above the rank of Supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

1451-93-R: Canadian Union of Public Employees (Applicant) v. The Stayner Hydro Commission (Respondent)

Unit: "all employees of The Stayner Hydro Commission, save and except superintendent and persons above the rank of superintendent" (2 employees in unit) (*Having regard to the agreement of the parties*)

1453-93-R: Ontario Nurses' Association (Applicant) v. Green Gables Manor Inc. (Respondent)

Unit: "all Registered and Graduate Nurses employed by Green Gables Manor Inc. at Green Gables Manor Nursing Home in the Town of Whitchurch-Stouffville, save and except Administrator/Director of Nursing and persons above the rank of Administrator/Director of Nursing" (8 employees in unit) (*Having regard to the agreement of the parties*)

1454-93-R: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 562 (Applicants) v. GSM Mechanical Systems (A Division of Guelph Sheet Metal Ltd.) (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of GSM Mechanical Systems (A Division of Guelph Sheet Metal Ltd.) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of GSM Mechanical Systems (A Division of Guelph Sheet Metal Ltd.) in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1456-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sam Rabito Construction Limited (Respondent)

Unit: "all construction labourers, in the employ of Sam Rabito Construction Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1463-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent)

Unit: “all Security Guards of Ontario Hydro at the Lambton Thermal Generation Station, save and except Supervisors, persons above the rank of Supervisor and employees in bargaining units for which any trade union held bargaining rights as of August 3, 1993” (13 employees in unit) (*Having regard to the agreement of the parties*)

1468-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Esam Construction Limited (Respondent)

Unit: “all employees of Esam Construction Limited engaged in Building Cleaning Services at Westown Plaza Mall, 301 Oxford Street, West, in the City of London, save and except non-working forepersons and persons above the rank of non-working foreperson” (5 employees in unit) (*Having regard to the agreement of the parties*)

1482-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. F.H.R. Construction Ltd. (Respondent)

Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those engaged in the repair and maintenance of same, truck drivers, and construction labourers in the employ of F.H.R. Construction Ltd. in the Townships of Lorrain, Bucke, Coleman, Dymond, Gillies Limit, First Brook, Barr, Kittson, Brigstocke and Harris excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson” (14 employees in unit)

1485-93-R: Ontario Public Service Employees Union (Applicant) v. The Penetanguishene General Hospital (Respondent)

Unit: “all employees of The Penetanguishene General Hospital in the Town of Penetanguishene, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office and clerical staff and persons for whom any trade union held bargaining rights as of August 3, 1993” (73 employees in unit) (*Having regard to the agreement of the parties*)

1487-93-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Timbuktu Natural Foods Inc. (Respondent)

Unit: “all employees of Timbuktu Natural Foods Inc. in the City of Markham, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (15 employees in unit) (*Having regard to the agreement of the parties*)

1533-93-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Crane Canada Inc. (Respondent)

Unit: “all employees of Crane Canada Inc. at its Crane Supply Division in the City of Pembroke, save and except supervisors, those above the rank of supervisor, sales staff and students” (4 employees in unit) (*Having regard to the agreement of the parties*)

1557-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: “all employees of Ontario Guard Services Inc. in the County of Essex, save and except Supervisors, persons above the rank of Supervisor, Dispatchers, office, clerical and sales staff” (14 employees in unit)

1560-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Robby Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Robby Electric Ltd. in all sectors of the construction industry in

the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0763-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Diamond Taxicab Association (Toronto) Limited (Respondent)

Unit: "all employees of Diamond Taxicab Association (Toronto) Limited operating under the roof sign "Diamond Taxi" in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, office and clerical staff, and multiplate/multicar owner/leasees" (900 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	456
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	246
Number of ballots marked against applicant	100
Number of ballots segregated and not counted	106

1024-93-R: Canadian Union of Public Employees (Applicant) v. York University (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

Unit: "all security and parking officers in the Department of Safety, Security and Parking Services employed to protect the property of York University in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (49 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of ballots marked in favour of applicant	43
Number of ballots marked in favour of intervener	3

1244-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) (Applicant) v. University of Windsor (Respondent)

Unit: "all patrolpersons and patrolperson II (heretofore referred to as "University of Windsor Campus Police") of the University of Windsor at Windsor, save and except sergeants, persons above the rank of sergeant, and persons employed for not more than 24 hours per week" (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	7
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	7
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	0
Ballots segregated and not counted	0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0944-93-R: Service Employees International Union, Local 204, affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. National Council of Jewish Women (Respondent)

Unit: "all employees of the National Council of Jewish Women, Toronto Section, Bathurst/Prince Charles Outreach and Attendant Care Programs in the Municipality of Metropolitan Toronto regularly employed for

not more than 24-hours per week, save and except supervisors and persons above the rank of supervisor” (20 employees in unit)

Number of names of persons on revised voters' list	125
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0

1029-93-R: United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Kelloryn Hotels (Ottawa) Inc. c.o.b. as Howard Johnson Plaza Hotel Ottawa (Respondent) v. Hospitality & Service Trades Union Local 261 (Intervener)

Unit: “all employees of Kelloryn Hotels (Ottawa) Inc. c.o.b. as Howard Johnson Plaza Hotel Ottawa in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, front desk, office and clerical staff” (30 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	6

Applications for Certification Dismissed Without Vote

1477-90-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Black & McDonald Limited (Respondent) v. International Brotherhood of Electrical Workers, IBEW Construction Council of Ontario, and Local Union 1687, IBEW (Intervener)

1252-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards employed by Group 4 C.P.S. Limited at 95 and 105 Moatfield Drive in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (7 employees in unit)

1323-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Ferma Construction Company Inc.; Ferma Underground Services Inc.; Ferragine Sales and Leasing Ltd.; Ferma Ready Mix Ltd. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3494-91-R: Labourers International Union of North America, Local 183 (Applicant) v. Ledcor Industries Limited (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit #1: “all employees of Ledcor Industries Limited in the Province of Ontario in Ontario Labour Relations Board area 8 only, save and except field engineers, surveyors, safety coordinators, clerical field staff, non-working foremen, management and office staff.” (17 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	10
Number of ballots segregated and not counted	5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0857-92-R: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Amp-Con Drywall Acoustics Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Amp-Con Drywall Acoustics Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of Amp-Con Drywall Acoustics Ltd. in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foremen" (2 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2

0850-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Canadian Call Processing Services Inc. (Respondent)

Unit: "all employees of Canadian Call Processing Services Inc. in the Municipality of Metropolitan Toronto, save and except chat supervisors and persons above the rank of chat supervisor" (54 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	31

0867-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hayden Industries Incorporated (Respondent)

Unit: "all employees of Hayden Industries Incorporated in the City of Brantford, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	15

1153-93-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Fairview Nursing Home Limited (Respondent)

Unit: "all employees of Fairview Nursing Home Limited regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, activationists, registered and graduate nurses and office and clerical staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	13

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	7

Applications for Certification Withdrawn

3552-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent) v. Group of Employees (Objectors)

0716-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Boemer-Anderson Construction Ltd. (Respondent)

1043-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Ontario Guard Services Inc. (Respondent) v. Canadian Union of Professional Security Guards and Ontario Guards (Intervener)

1117-93-R: Retail, Wholesale and Department Store Union (Applicant) v. Ault Foods Limited (Respondent)

1145-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. G & A Maray Construction Ltd. (Respondent)

1255-93-R: Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the County of Bruce Incorporated (Respondent)

1279-93-R; 1280-93-R; 1281-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canpark Services Ltd. (Respondent)

1360-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. United Steelworkers of America (Intervener)

1382-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Ltd. (Respondent)

1384-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

1385-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. United Steelworkers of America (Intervener)

1386-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. United Steelworkers of America (Intervener)

1432-93-R: Laundry and Linen Drivers and Industrial Workers, Local 847 (Applicant) v. Grayker Corporation (Respondent)

1434-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. United Steelworkers of America (Intervener)

1435-93-R: Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. United Steelworkers of America (Intervener)

1488-93-R: Christian Labour Association of Canada (Applicant) v. The Governing Council of the Salvation Army Canada East (Respondent)

1500-93-R; 1501-93-R; 1502-93-R; 1503-93-R; 1504-93-R; 1505-93-R; 1506-93-R: National Automobile, Aero-

space and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. General Motors of Canada Limited (Respondent)

1523-93-R: Hospitality & Service Trades Union Local 261 (Applicant) v. Clarion Hotel (Respondent)

1618-93-R: Canadian Union of Public Employees (Applicant) v. Central Neighbourhood House (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1211-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent) (*Granted*)

Unit: (see Bargaining Agents Certified without vote)

1250-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent) (*Granted*)

Unit: (see Bargaining Agents Certified without vote)

1359-93-R: International Union of Operating Engineers Local 796 (Applicant) v. Oshawa General Hospital (Respondent) v. Canadian Union of Public Employees and its Local 45 (Intervener) (*Granted*)

Unit: (see Bargaining Agents Certified without vote)

1489-93-R: Christian Labour Association of Canada (Applicant) v. The Governing Council of the Salvation Army Canada East (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3937-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Limited, Franchise Owners Toronto Limited, 958424 Ontario Inc. carrying on business as Rapco Management Services, 930571 Ontario Inc. carrying on business as Boss Technical Services (Respondents) (*Withdrawn*)

1153-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Limited, Franchise Owners Toronto Limited, 958424 Ontario Inc. carrying on business as Rapco Management Services, 930571 Ontario Inc. carrying on business as Boss Technical Services, 3C Complete Communications Consulting Inc. (Respondents) (*Withdrawn*)

2503-92-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Manz Contracting Services Inc. and Skyline Painting Inc. (Respondent) (*Granted*)

3271-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Ltd., Franchise Owners Toronto Limited, Willow Telecommuting Systems Canada Inc., Willow Telecommunications Corporation (Respondents) (*Withdrawn*)

3782-92-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. M & AL Roofing Ltd. and/or Les Toitures M & AL Canada Ltée./M & AL Roofing Canada Ltd. and/or Ron Robinson Roofing Inc./Les Toitures Ron Robinson Inc. (Respondents) (*Granted*)

0532-93-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of its Local International Union of Bricklayers and Allied Craftsmen Local 8, Barrie (Applicant) v. H. Monteith, Murard Masonry Contractors Ltd., Howard Monteith Masonry Ltd., 948255 Ontario Limited c.o.b. as Simcoe Masonry and 515461 Ontario Limited (Respondents) v. Labourers' International Union of North America, Local 506 (Intervener) (*Granted*)

0628-93-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Beta Decorating Ltd. and/or Maler Painting (Respondents) (*Granted*)

0752-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Bascelli Construction Inc. and C.T.B. Construction Inc. (Respondents) (*Granted*)

0763-93-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 1, Hamilton (Applicant) v. Vinmod Masonry Construction Limited and Vinmod Construction Inc. (Respondent) (*Granted*)

0885-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rex Forming Limited and Royal Forming Limited (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

1115-93-R: International Union of Bricklayers & Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Ultra Masonry Ltd. and D. Wilson Masonry Ltd. (Respondents) (*Granted*)

1374-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Robert Charles Steenson c.o.b. as Ontario Air Systems and Ontario Air Systems Limited (Respondent) (*Withdrawn*)

1495-93-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Leem Decor, Division of 423263 Ontario Limited and Mikhail Zigelman c.o.b. as M Z Painting and Decorating and/or M Z Painting Inc. (Respondents) (*Withdrawn*)

1625-93-R: International Union of Bricklayers & Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. C.N. Bricklayers Inc. Pereira's Bricklayers and Permar Construction Inc. (Respondents) (*Granted*)

1647-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Ltd., Anil Uppal c.o.b. as J.E. Electric (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3937-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Limited, Franchise Owners Toronto Limited, 958424 Ontario Inc. carrying on business as Rapco Management Services, 930571 Ontario Inc. carrying on business as Boss Technical Services (Respondents) (*Withdrawn*)

1153-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Limited, Franchise Owners Toronto Limited, 958424 Ontario Inc. carrying on business as Rapco Management Services, 930571 Ontario Inc. carrying on business as Boss Technical Services, 3C Complete Communications Consulting Inc. (Respondents) (*Withdrawn*)

2503-92-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Manz Contracting Services Inc. and Skyline Painting Inc. (Respondent) (*Granted*)

3271-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Ltd., Franchise Owners Toronto Limited, Willow Telecommuting Systems Canada Inc., Willow Telecommunications Corporation (Respondents) (*Withdrawn*)

0532-93-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of its Local International Union of Bricklayers and Allied Craftsmen Local 8, Barrie (Applicant) v. H. Monteith, Murard Masonry Contractors Ltd., Howard Monteith Masonry Ltd.,

948255 Ontario Limited c.o.b. as Simcoe Masonry, 515461 Ontario Limited (Respondents) v. Labourers' International Union of North America, Local 506 (Intervener) (*Granted*)

0628-93-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Beta Decorating Ltd. and/or Maler Painting (Respondents) (*Granted*)

0656-93-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Scott Avery Ltd. (Respondent) (*Withdrawn*)

0752-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Bascelli Construction Inc. and C.T.B. Construction Inc. (Respondents) (*Granted*)

0763-93-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 1, Hamilton (Applicant) v. Vinmod Masonry Construction Limited and Vinmod Construction Inc. (Respondent) (*Granted*)

0885-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rex Forming Limited and Royal Forming Limited (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

1115-93-R: International Union of Bricklayers & Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Ultra Masonry Ltd. and D. Wilson Masonry Ltd. (Respondents) (*Granted*)

1260-93-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 968684 Ontario Inc. (Respondent) (*Granted*)

1374-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Robert Charles Steenson c.o.b. as Ontario Air Systems and Ontario Air Systems Limited (Respondent) (*Withdrawn*)

1495-93-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Leem Decor, Division of 423263 Ontario Limited and Mikhail Zigelman c.o.b. as M Z Painting and Decorating and/or M Z Painting Inc. (Respondents) (*Withdrawn*)

1625-93-R: International Union of Bricklayers & Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. C.N. Bricklayers Inc., Pereira's Bricklayers and Permar Construction Inc. (Respondents) (*Granted*)

1647-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Ltd., Anil Uppal c.o.b. as J.E. Electric (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0921-93-R: Simon Rowe (Applicant) v. United Food and Commercial Workers International Union, Local 175/633 (Respondent) v. Penny Lane Food Market Ltd. (Intervener)

Unit: "all employees of Penny Lane Food Market Ltd. employed for not more than 24 hours per week, students employed in off-school hours and school vacation periods in the Province of Ontario, not including the Counties of Renfrew, Lanark, Carleton, Leeds, Grenville, Dundas, Stormont, Prescott, Russell and Glengarry, save and except Store Manager and persons above the rank of Store Manager" (20 employees in unit) (*Dismissed*)

0922-93-R: Greg Hamid (Applicant) v. United Food and Commercial Workers International Union, Local 175/633 (Respondent) v. Penny Lane Food Market Ltd. (Intervener)

Unit: “all Meat Department employees of Penny Lane Food Market Ltd. in its retail food supermarkets in the Province of Ontario, not including the Counties of Renfrew, Lanark, Carleton, Leeds, Grenville, Dundas, Stormont, Russell, Prescott and Glengarry, save and except part-time employees employed for not more than 24 hours per week” (4 employees in unit) (*Dismissed*)

0923-93-R: Peter Devellis (Applicant) v. United Food and Commercial Workers International Union, Local 175/633 (Respondent) v. Penny Lane Food Market Ltd. (Intervener)

Unit: “all employees of Penny Lane Food Market Ltd., in its retail food supermarkets in the Province of Ontario, not including the Counties of Renfrew, Lanark, Carleton, Leeds, Grenville, Dundas, Stormont, Russell, Prescott and Glengarry, save and except Meat Department employees, Store Manager, persons above the rank of Store Manager, persons employed for not more than 24 hours per week and students employed in off-school hours and during the school vacation periods” (14 employees in unit) (*Dismissed*)

1430-93-R: Alphonsus Benoit (Applicant) v. Labourers’ International Union of North America, Local 1081 (Respondent) v. Dave’s Custom Trenching Ltd. (Intervener) (*Withdrawn*)

1431-93-R: Scott Richard Stephen (Applicant) v. Graphic Communications International Union, Local 500M (Respondent)

Unit: “all Offset Pressmen, Press Apprentices and Press Helpers and all Strippers, Plate-Makers and Apprentices employed by Data Business Forms Limited (Don Mills Division) in Metropolitan Toronto” (18 employees in unit) (*Withdrawn*)

1518-93-R: Robert McKenzie (Applicant) v. United Steelworkers of America (Respondent) v. A.M. Castle & Co. (Canada) Inc. (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1600-93-U: PCL Constructors Eastern Inc. (Applicant) v. Toronto-Central Ontario Building & Construction Trades Council and Chris Thurrott (Respondent) (*Withdrawn*)

DIRECTION RESPECTING UNLAWFUL LOCKOUT

1412-93-U: Labourers’ International Union of North America, Local 1059 (Applicant) v. The McBride Group Inc. (Respondent) (*Withdrawn*)

1464-93-U: Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. CAA Ottawa (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2650-90-U: Leila Yateman (Applicant) v. Canadian Union of Public Employee’s Local 1974 (“the Union”) (Respondent) v. Kingston General Hospital (“the Hospital”) (Intervener) (*Dismissed*)

1613-91-U: Otto Kerber (Applicant) v. International Brotherhood of Painters and Allied Trades (Respondent) v. Ontario Hydro, Electrical Power Systems Construction Association (Interveners) (*Dismissed*)

2316-91-U: United Steelworkers of America (Applicant) v. Service Employees Union, Local 210 (Respondent) (*Terminated*)

3299-91-U: Fernando Tontodonati (Applicant) v. Metro Labour Education Centre (Respondent) (*Terminated*)

3677-91-U: Labourers' International Union of North America, Local 183 (Applicant) v. Ledcor Industries Limited (Respondent) v. Christian Labour Association of Canada (Intervener) (*Terminated*)

3703-91-U: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Inc. and Louis Trindade (Respondents) (*Granted*)

3857-91-U: C. Laurin, C. Maynard, E. Frueh, M. Warnock, C. Hoy, C. Latondress, H. Hamilton, S. Wilson, M. Shaw and J. Fritz (Applicant) v. Service Employees International Union, Local 204 ("Union") and Huronia District Hospital (St. Andrews Hospital, Midland Ontario) (Respondents) (*Terminated*)

3891-91-U: William Curtis (Applicant) v. C.P.U. & C.P.U. Local 134 (Respondents) (*Dismissed*)

3936-91-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Limited; Franchise Owners Toronto Limited, 958424 Ontario Inc. carrying on business as Rapco Management Services, 930571 Ontario Inc. carrying on business as Boss Technical Services (Respondents) (*Withdrawn*)

3993-91-U: Tim Turner (Applicant) v. The Retail, Wholesale Bakery and Confectionary Workers Union, Local 461 of the R.W.D.S.U. AFL-CIO-CLC and Rick Kent, Alf Davis, Gary Sage, Ab Player (Respondent) v. Weston Bakeries (Intervener) (*Granted*)

0268-92-U: Jan Zeberek (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondent) (*Withdrawn*)

0676-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Hudson's Bay Company (Respondent) (*Terminated*)

1379-92-U: James Norman Fiddler (Applicant) v. Canadian Union of Public Employees Local 66 & City of Mississauga - Human Resources (Respondents) (*Withdrawn*)

1388-92-U: George Reid (Applicant) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) v. Toronto Board of Education (Intervener) (*Dismissed*)

1961-92-U; 1962-92-U; 1963-92-U: John Gale (Applicant) v. Local 222 of the C.A.W. General Motors Unit (Respondent); Ron Langlois (Applicant) v. Local 222 of the C.A.W. General Motors Unit (Respondent); Brad Chartier (Applicant) v. Local 222 of the C.A.W. General Motors Unit (Respondent) (*Dismissed*)

2376-92-U: Ken Hall (Applicant) v. Teamsters Local 230 (Respondent) (*Withdrawn*)

2377-92-U: Ken Hall (Applicant) v. Dufferin/Custom Concrete Group (Respondent) (*Withdrawn*)

2640-92-U: Pamela Thomas (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) Local 303 and General Motors of Canada Limited (Respondents) (*Withdrawn*)

3269-92-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Limited ("PPL"), Franchise Owners Toronto Limited ("FOTL"), 958424 Ontario Inc., carrying on business as Rapco Management Services ("Rapco"), 930571 Ontario Inc., carrying on business as Boss Technical Services ("Boss"), 3C Complete Communications Consulting Inc. ("3C"), Willow Telecommuting Systems Canada Inc. and Willow Telecommunications Corporation (collectively "Willow") (Respondents) (*Withdrawn*)

3270-92-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Ltd., Franchise Owners Toronto Limited, Willow Telecommuting Systems Canada Inc., Willow Telecommunications Corporation (Respondents) (*Withdrawn*)

3272-92-U: Canadian Paperworkers Union and its Local 595 (Applicant) v. Domtar Inc. (Respondent) (*Withdrawn*)

3423-92-U: Christian Labour Association of Canada, Local 6 (Applicant) v. Canadian Carpet Mills (Respondent) (*Withdrawn*)

3532-92-U: Tina Monteiro (Applicant) v. Pavement Management Systems Limited, Marta Fechete and Matt Karan (Respondent) (*Withdrawn*)

3576-92-U: Service Employees Union, Locals 183, 204, 210, 220 (Applicant) v. Reliacare Inc., Hallowell House, Uxbridge Health Care, Elmwood Place, Port Dover Nursing Home, Tecumseh Health Care and Maitland Manor (Respondents) (*Withdrawn*)

3724-92-U: Jacqueline Gardner (Applicant) v. White-Wood Thunder Bay Ltd. (Respondent) (*Withdrawn*)

0004-93-U: Teamsters Local Union No. 419 (Applicant) v. Burnac Corporation (Respondent) (*Withdrawn*)

0156-93-U: Kenneth Andrew Laurie (Applicant) v. Sheet Metal Workers Local 30 (Respondent) v. Principal Heating Company Limited (Intervener) (*Withdrawn*)

0191-93-U: Canadian Union of Public Employees (Applicant) v. Durham Region Non-Profit Housing Corporation (Respondent) (*Withdrawn*)

0227-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service and Gerald Hanlon (Respondents) (*Withdrawn*)

0277-93-U: Donald Agnew (Applicant) v. Teamsters Local Union 230, Premier/KVN Concrete (Division of ESSROC Canada Inc.) (Respondents) (*Dismissed*)

0391-93-U: George Lee Room Service/Mini bar (Applicant) v. Delta Chelsea Inn Hotel 1- Rajeev Khanduja Room Service Manager 2- Jose Esqueda Food and Beverage Manager (Respondent) (*Withdrawn*)

0392-93-U: Frankie Das, Room Service/Mini Bar Delta Chelsea Hotel (Applicant) v. 1- Rajeev Khanduja, Room Service Manager 2- Jose Esqueda, Food and Beverage Manager (Respondent) v. Hotel Employees Restaurant Employees Union Local 75 (Intervener) (*Withdrawn*)

0464-93-U: Dubreuil Brothers Employees Association, Division of IWA Canada, Local 2693 (Applicant) v. Dubreuil Forest Products Limited (Respondent) (*Withdrawn*)

0841-93-U: Hotels, Clubs, Restaurants and Taverns Employees Union - Local 261 (c/o Hospitality & Service Trades Union Local 261) (Applicant) v. Beacon Arms Hotel (c/o Capital Hill Hotel & Suites) (Respondent) (*Withdrawn*)

0863-93-U: Marty O'Shaughnessy (Applicant) v. City of Cornwall and their agents acting on their behalf, Sherman Goodwin, Ronald Cotnam, Ian Poapst (Respondents) (*Withdrawn*)

0975-93-U: Wendy Knelsen (Applicant) v. Presstran Industries, a division of Cosma International Inc. (Respondent) (*Withdrawn*)

1012-93-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (Respondent) (*Withdrawn*)

1073-93-U; 1074-93-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Boemer Anderson Construction Ltd., William Anderson and Joe Boemer (Respondents) (*Withdrawn*)

1113-93-U: Samia Ibrahim (Applicant) v. Miracle Food Mart, United Food & Commercial Workers Union, Local 175/633 (Respondents) (*Withdrawn*)

1154-93-U; 1155-93-U; 1156-93-U; 1229-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dart Machine Limited (Respondent) (*Withdrawn*)

1184-93-U: Bryan Forde (Applicant) v. National Association of Broadcast Employees & Technicians Local 700 (Respondent) (*Withdrawn*)

1203-93-U: Gregory Murphy (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) and its Local 251 (Respondent) (*Withdrawn*)

1262-93-U: Canadian Union of Public Employees, Local 3685 (Applicant) v. Halton Roman Catholic School Board (Respondent) (*Withdrawn*)

1271-93-U: Syl Parr (Applicant) v. CUPE Local 2166 Spruce Lodge Complex (Respondent) v. Spruce Lodge (Intervener) (*Withdrawn*)

1326-93-U: Mark Tonkovich (Applicant) v. Shrader Canada Ltd. (Respondent) v. United Steelworkers of America (Intervener) (*Withdrawn*)

1327-93-U: Labourers' International Union of North America, Local 1059 (Applicant) v. London Floor Services Limited (Respondent) (*Withdrawn*)

1329-93-U: John Leal (Applicant) v. Suncor, Sunoco Group, Sunoco Inc. and London Terminal Employee's Association (Respondents) (*Withdrawn*)

1331-93-U: Service Employees Union, Local 183 (Applicant) v. First Tran Bus Services (A Division of Transcor Inc.) (Respondent) (*Withdrawn*)

1427-93-U: Canadian Union of Public Employees Local 3101 (Applicant) v. Maison Mere des Soeurs de la Charite d'Ottawa (Respondent) (*Withdrawn*)

1439-93-U: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Accucaps Industries Limited (Respondent) (*Withdrawn*)

1443-93-U: Service Employees' Union, Local 210 (Applicant) v. The Metropolitan General Hospital (Respondent) (*Withdrawn*)

1448-93-U: Amalgamated Clothing and Textile Workers Union (Applicant) v. Webber Pant Company (Respondent) (*Withdrawn*)

1462-93-U: Canadian Union of Educational Workers, Local 3 (Applicant) v. York University, Dean S. Shapson (Respondents) (*Withdrawn*)

1465-93-U: Retail, Wholesale and Department Store Union, Canadian Service Sector, A Division of The United Steelworkers of America, Local 414 (Applicant) v. CAA Ottawa (Respondent) (*Withdrawn*)

1499-93-U: Nancy Farquharson (Applicant) v. L.I.U.N.A., Local 183, Training & Rehabilitation Centre, Trust Fund, (Labourer's International Union of North America) (Respondent) (*Dismissed*)

1614-93-U: Service Employees International Union, Local 204 (Applicant) v. The Ontario Jockey Club (Respondent) (*Withdrawn*)

1617-93-U: Labourers' International Union of North America, Local 183 (Applicant) v. E.G.M. Cape & Co. Ltd., Starcip Forming Ltd. and Truestar Forming Ltd. (Respondents) (*Withdrawn*)

1648-93-U: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Ltd., Anil Uppal c.o.b. as J.E. Electric (Respondents) (*Withdrawn*)

1663-93-U: Balbir Singh Bhangoo (Applicant) v. Ontario Taxi Union Local 1688, R.W.D.S.U. - United Steelworkers Union of America AFL-CIO-CLC (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

1289-93-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Fischer-Hallman Service Centre Inc. (Respondent) (*Withdrawn*)

1347-93-M: Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414, 422, 440, 461, 1000 and the Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. New Dominion Stores, a division of the Great Atlantic and Pacific Company of Canada, Limited (Respondent) v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its Local affiliate Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, 429, 545, 579, 582 and 915 (Intervener) (*Granted*)

1423-93-M: Groff & Associates Ltd. and Mechanical Contractors Association Ontario (Applicants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Respondent) (*Withdrawn*)

1517-93-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Associated Mechanical Systems Inc., Associated Mechanical Services Ltd. and/or Larry Burgess c.o.b. as Associated Mechanical Services (Respondents) (*Granted*)

1543-93-M: United Food & Commercial Workers Union, Local 1977 (Applicant) v. Loeb Club Plus - Walker Place (Respondent) (*Withdrawn*)

1609-93-M: Brian Hack (Applicant) v. Carlton Cards Limited (Respondent) (*Withdrawn*)

1611-93-M: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent) (*Withdrawn*)

1616-93-M: Labourers' International Union of North America, Local 183 (Applicant) v. E.G.M. Cape & Co. Ltd., Starcip Forming Ltd. and Truestar Forming Ltd. (Respondents) (*Withdrawn*)

1642-93-M: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. The McBride Group Inc. (Respondent) (*Withdrawn*)

1649-93-M: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Ltd., Anil Uppal c.o.b. as J.E. Electric (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1552-93-M: Alpine Graphic Productions Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

1081-93-JD: Ironworkers' District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Comstock Canada, a division of Lundrigans-Comstock Limited, Millwrights' District Council of Ontario, Millwrights, Local 1244, United Brotherhood of Carpenters and Joiners of America, Millwrights, Local 1592, United Brotherhood of Carpenters and Joiners of America (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2150-92-M: Service Employees Union Local 268 (Applicant) v. The Corporation of the Town of Marathon (Recreation Dept.) (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3279-92-OH: Tom Shields (Applicant) v. Verdiroc Property Management (Respondent) (*Withdrawn*)

0420-93-OH: Gonzalo Herrera (Applicant) v. Donalco Inc. (Respondent) (*Withdrawn*)

0762-93-OH: Barry G. Goobie (Applicant) v. Consumers Glass (Respondent) v. Aluminum, Brick & Glass-Local 203G (Intervener) (*Withdrawn*)

1084-93-OH: D.J. Leitch (Applicant) v. Harris Management (Respondent) (*Withdrawn*)

1179-93-OH: Wayne Gaston (Applicant) v. Diversy Inc. (Respondent) (*Withdrawn*)

1608-93-OH: Brian Hack (Applicant) v. Carlton Cards Limited (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1608-89-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Foundation Company of Canada Limited (Respondent) v. Labourers' International Union of North America, Local 506, Duron Ontario Ltd. (Intervenors) (*Withdrawn*)

0204-91-G: Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007 (Applicant) v. E. S. Fox Limited (Respondent) (*Granted*)

1048-92-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Newman Construction (Respondent) (*Withdrawn*)

1806-92-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondent) (*Withdrawn*)

2775-92-G: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Manz Contracting Services Inc. and Skyline Painting Inc. (Respondents) (*Granted*)

2828-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Applicant) v. Hi-Grade Welding Co. Ltd., Ro-Less Enterprises Limited (Respondents) (*Terminated*)

0201-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 628 (Applicant) v. E. S. Fox Limited (Respondent) (*Dismissed*)

0242-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Gorf Contracting Limited (Respondent) (*Granted*)

0245-93-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen Local 1, Hamilton (Applicant) v. Vinmod Masonry Construction Limited and Vimrod Construction Inc. (Respondent) (*Granted*)

0533-93-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of its Local International Union of Bricklayers and Allied Craftsmen Local 8,

Barrie (Applicant) v. H. Monteith, Murard Masonry Contractors Ltd., Howard Monteith Masonry Ltd., 948255 Ontario Limited c.o.b. as Simcoe Masonry and 515461 Ontario Limited (Respondents) v. Labourers' International Union of North America (Intervener) (*Granted*)

0723-93-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Landar Insulation Corporation Ltd. (Respondent) (*Granted*)

0886-93-G; 0887-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rex Forming Limited (Respondent); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Royal Forming Limited (Respondent) (*Withdrawn*)

0912-93-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Roman Eagle Masonry Ltd. (Respondent) (*Granted*)

1066-93-G: Labourers' International Union of North America, Local 506 (Applicant) v. 515461 Ontario Limited, c.o.b. as Martin Schepers Masonry (Respondent) (*Granted*)

1080-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. W. G. Wood Sales Company Limited (Respondent) v. Sheet Metal Workers' International Association, Local 562, Ontario Sheet Metal Workers' & Roofers' Conference, and SMC Installations (Intervenors) (*Withdrawn*)

1095-93-G: Labourers' International Union of North America Local 506 (Applicant) v. Umacs of Canada Inc. (Respondent) (*Withdrawn*)

1173-93-G: Teamsters Local Union No. 230 (Applicant) v. Empire Paving Ltd. (Respondent) (*Withdrawn*)

1175-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Byblock Masonry Ltd. (Respondent) (*Granted*)

1178-93-G: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario (Applicant) v. C.N. Bricklayers Inc., Pereira's Bricklayers and Permar Construction Inc. (Respondents) (*Granted*)

1187-93-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Comstock Canada, a division of Lundrigans-Comstock Limited (Respondent) (*Granted*)

1193-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. A.B.T. Marble and Tile Ltd. (Respondent) (*Granted*)

1221-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. City Steel Construction (Respondent) (*Granted*)

1243-93-G: Labourers' International Union of North America - Local 247 (Applicant) v. Bradsil (1967) Limited (Respondent) (*Withdrawn*)

1282-93-G: Drywall Acoustic Lathing & Insulation Local 675 (Applicant) v. Retaylor's Interiors Inc. (Respondent) (*Withdrawn*)

1283-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Retaylor's Interiors Inc. (Respondent) (*Granted*)

1291-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Granted*)

1324-93-G: Bricklayers, Masons Independent Union of Canada - Local 1 (Applicant) v. Star Bricklayers Limited (Respondent) (*Granted*)

1336-93-G: International Union of Bricklayers And Allied Craftsmen Local #2, Ontario (Applicant) v. T.C. Bricklayers (Respondent) (*Granted*)

1350-93-G; 1351-93-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. Duron Ottawa Limited (Respondent) (*Granted*)

1425-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. L. Pupolin Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

1445-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

1446-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Colautti Construction Ltd. (Respondent) (*Withdrawn*)

1469-93-G: Labourers' International Union of North America, Local 607 (Applicant) v. Rugged Air Systems Limited (Respondent) (*Granted*)

1473-93-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Airstest Inc. (Respondent) (*Withdrawn*)

1475-93-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. J.A. Bouley Sheet Metal (Respondent) (*Withdrawn*)

1477-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Sipico Drywall Inc. (Respondent) (*Withdrawn*)

1478-93-G: The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union Number 172, Restoration Steeplejacks (Applicant) v. High Low Restoration Limited (Respondent) (*Granted*)

1484-93-G: Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Maple Terrazzo, Marble & Tile Incorporated (Respondent) (*Granted*)

1530-93-G; 51531-93-G: IBEW Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents); International Brotherhood of Electrical Workers Local Union 1788 (Applicant) v. Ontario Hydro and The Electrical Power Systems Construction Association (Respondents) (*Granted*)

1539-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. KVC Construction Limited (Respondent) (*Granted*)

1540-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Par-Tex Engineering & Contracting Co. Ltd. (Respondent) (*Granted*)

1573-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Withdrawn*)

1576-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Independent High Voltage Limited (Respondent) (*Withdrawn*)

1578-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lenwick Building Systems Inc. (Respondent) (*Withdrawn*)

1621-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Conservatory Group (Respondent) (*Withdrawn*)

1645-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Withdrawn*)

1661-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Gazzola Paving Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2848-91-M: Christian Labour Association of Canada (Applicant) v. Ledcor Industries Limited (Respondent) (*Terminated*)

1516-92-R; 1517-92-R: International Brotherhood of Electrical Workers, Local Union 115 (Applicant) v. Laurier Electric Limited and Atlas Power Systems Ltd. (Respondents) v. International Brotherhood of Electrical Workers, Local 586 (Intervener) (*Dismissed*)

3466-92-U: Eric de Buda (Applicant) v. The Society of Ontario Hydro Professional and Administrative Employees and Ontario Hydro (Respondents) (*Dismissed*)

3677-92-R; 3678-92-R: Ontario Nurses' Association (Applicant) v. James Bay General Hospital (Respondent) (*Granted*)

0843-93-R: Ontario Public Service Employees Union (Applicant) v. Meaford-Beaver Valley Community Support Services (Respondent) (*Withdrawn*)

1083-93-U: Leo M. Labatt (Applicant) v. Employee of Sunnybrook Health Science Centre (Respondent) (*Dismissed*)

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